(32,953)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 501

BYRAM

H. E. [redacted], MARK W. POTTER, AND EDWARD J. BRUNDAGE, AS RECEIVERS, ETC., APPELLANTS,

vs.

A. G. RISTY, CHRIS OLSON, L. E. LARSON, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA

INDEX

	Original	Print
Record from the district court of the United States, district of South Dakota	1	1
Citation and service (omitted in printing)	1	
Bill of complaint	5	1
Exhibit "A"—Chapter 98 of the Session Laws of 1905	38	26
Exhibit "B"—Proposed distribution of proportional benefits	62	45
Exhibit "C"—Drainage notice	63	46
Exhibit "D"—Decree in case of C., M. & St. P. Ry. Co. vs. Risty et al	76	90
Motion for interlocutory injunction	82	94
Notice of motion for injunction and marshal's returns	86	96
Showing in response to motion for interlocutory injunction	94	99

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 18, 1927

	Original	Print
Exhibits in evidence	132	126
Resolution of board of county commissioners fixing cost of drainage ditch	132	126
Stipulation in matter of appeal from assessment in case of Board of Commissioners vs. C., M. & St. P. Ry. Co	135	127
Judgment, case of Board of Commissioners vs. C., M. & St. P. Ry. Co	139	129
Receipt showing payment of tax on drainage ditch	142	131
Order denying injunction	145	132
Assignments of error	149	133
Petition for appeal	152	135
Order allowing appeal	154	135
Bond on appeal (omitted in printing)	156	
Præcipe for transcript of record (" " ")	161	
Clerk's certificate (" " ")	166	
Statement of points to be relied upon and designation of parts of record to be printed	167	136
Designation of additional parts of record to be printed	169	138

[fols. 1-4]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

Citation, in usual form, showing service on Jones & Bartlett, filed August 3, 1927, omitted in printing.

[fol. 5] IN UNITED STATES DISTRICT COURT, DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

In Equity. No. 291 Eq., S. D.

H. E. BYRAM, MARK W. POTTER, and EDWARD J. BRUNDAGE, as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, Plaintiffs,

vs.

A. G. RISTY, CHRIS OLSON, L. E. LARSON, FLETCHER ALGUIRE, and William Stringham, as County Commissioners of Minnehaha County, South Dakota; Dale E. Howe, as County Auditor of Minnehaha County, South Dakota, and Fred A. Mundt, as County Treasurer of Minnehaha County, South Dakota, Defendants

BILL OF COMPLAINT—Filed June 23, 1927

The plaintiffs, H. E. Byram, and Edward J. Brundage, residents and citizens of the state of Illinois, and Mark W. Potter, a resident and citizen of the state of New York, bring this their bill of complaint against A. G. Risty, Chris Olson, L. E. Larson, Fletcher Alguire, and William Stringham, as County Commissioners of Minnehaha County, South Dakota, Dale E. Howe, as County Auditor of Minnehaha County, South Dakota, and Fred A. Mundt, as County Treasurer of Minnehaha County, South Dakota, residents and citizens of the state of South Dakota and of the Southern Division of the District of South Dakota, and respectfully show unto the Court:

First

That the Chicago, Milwaukee & St. Paul Railway Company is and was during all the times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the state of Wisconsin and a resident and citizen of said state of Wisconsin within the meaning and [fol. 6] intent of the laws conferring jurisdiction upon the District Courts of the United States; that the plaintiffs H. E. Byram and Edward J. Brundage, are and were during all the times hereinafter mentioned residents and citizens of the state of Illinois, and that the plaintiff, Mark W. Potter, is and was during all the times hereinafter mentioned a resident and citizen of the state of New York.

Second

That the defendants, A. G. Risty, Chris Olson, L. E. Larson, Fletcher Alguire, and William Stringham the County Commissioners of Minnehaha County, South Dakota, Dale E. Howe, the County Auditor of Minnehaha County, South Dakota, and Fred A. Mundt, the County Treasurer of Minnehaha County, South Dakota, are each of them residents and citizens of the state of South Dakota and of the Southern Division of the District of South Dakota.

Third

That upon the 18th day of March, 1925, in a suit pending in the District Court of the United States for the Northern District of Illinois and the Eastern Division thereof, in which the Binkley Coal Company was plaintiff and the Chicago, Milwaukee & St. Paul Railway Company was defendant, the plaintiffs, H. E. Byram, Mark W. Potter, and Edward J. Brundage, were duly appointed as Receivers of the said Chicago, Milwaukee & St. Paul Railway Company by the Hon. James H. Wilkerson, District Judge of the said Northern District of Illinois, and that in a suit ancillary to said suit in the Northern District of Illinois the said H. E. Byram, Mark W. Potter and Edward J. Brundage were upon the said 18th day of March, 1925, duly appointed as Receivers of the said Chicago, Milwaukee & St. Paul Railway Company by the District Court of the United States

for the District of Minnesota and the Fourth Division [fol. 7] thereof by the Hon. Wilbur F. Booth, District Judge for the said District of Minnesota; and that upon the 19th day of March, 1925, a duly authenticated copy of the order appointing said Receivers in said ancillary suit was filed in the office of the Clerk of the District Court of the United States for the District of South Dakota; that the said H. E. Byram, Mark W. Potter, and Edward J. Brundage did thereupon duly qualify as such receivers and are the duly appointed, qualified and acting Receivers of the Chicago, Milwaukee & St. Paul Railway Company pursuant to said order of the District Court of the United States for the Northern District of Illinois and the Eastern Division thereof, and said order in said ancillary suit of the District Court for the District of Minnesota and the Fourth Division thereof.

Fourth

That the defendants, A. G. Risty, Chris Olson, L. E. Larson, Fletcher Alguire and William Stringham, are the duly elected, qualified and acting county commissioners of the county of Minnehaha in the state of South Dakota, and constitute the board of county commissioners of said county of Minnehaha; that the defendant, Dale E. Howe, is the duly elected, qualified and acting auditor of the said county of Minnehaha, and the defendant, Fred A. Mundt, is the duly elected, qualified and acting treasurer of the said county of Minnehaha.

Fifth

That the Legislature of the state of South Dakota at the ninth session thereof enacted a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare," which purported act was [fol. 8] approved by the Governor of the State of South Dakota on March 7, 1905, and which purported act is commonly known as Chapter 98 of the Session Laws of South Dakota of 1905; that subsequently and at its tenth session the Legislature of the State of South Dakota re-

enacted said Chapter 98 of the Session Laws of 1905 by enacting a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Pubic Health, Convenience or Welfare or Whenever it Shall be Necessary or Practicable for Drainage of Agricultural Lands," which purported law was approved by the Governer of the State of South Dakota February 21, 1907, and which purported law is commonly known as Chapter 134 of the Session Laws of South Dakota of 1907; that by said Chapter 134 of the Session Laws of 1907 the Legislature of the State of South Dakota attempted to re-enact said purported law known as Chapter 98 of the Session Laws of 1905, together with amendments thereto; that subsequently the Legislature of the State of South Dakota at the Sixteenth Session thereof re-enacted said Chapter 134 of the Session Laws of 1907 with amendments thereto and that such re-enactment is contained in the South Dakota Revised Code 1919, as Sections 8458 to 8491 inclusive thereof; that at its second special session in the year 1920, the Sixteenth Legislature of the State of South Dakota amended sections 8464, 8471, 8472 and 8473 of said Revised Code by Chapter 46 of the laws of the second special session of said Sixteenth Legislature; that a copy of the purported law of the State of South Dakota known as Chapter 98 of the Session Laws of 1905 as amended and re-enacted as Chapter 134 of the Session Laws of 1907, and as amended and re-enacted as Sections 8458 to [fol. 9] 8491 of the South Dakota Revised Code, 1919, and amended at the second special session of the Sixteenth Legislature is hereto attached, marked "Exhibit A," and made a part hereof.

Sixth

That prior to the year 1916 the said board of county commissioners of the said county of Minnehaha, pretending to act under the authority, purported to be conferred upon said county commissioners by said purported laws, "Exhibit A" aforesaid, took action purporting to establish a drainage ditch known as Drainage Ditch No. 1 and a second drainage ditch known as Drainage Ditch No. 2; that said Drainage Ditch No. 1 extended from a point in Section

9, Township 101, north of Range 49, west of the Fifth Principal Meridian, through Sections 4, 5 and 32 in Township 102, north of said Range 49 to a point in Section 29, Township 102, north of said Range 49; that said Drainage Ditch No. 2 extended from the northern terminus of said Drainage Ditch No. 1 in said Section 29 in a northerly direction through townships 102, 103 and 104, north of said Range 49; that said drainage ditches extended for a distance of several miles through said township and were fully completed prior to the year 1916; that assessments for the cost of the construction of said Drainage Ditch No. 1 and Drainage Ditch No. 2 were made prior to the year 1916 and that all matters connected with the construction of said ditches and with the assessment for the cost thereof were fully completed prior to the year 1916.

Seventh

That the area of land drained by said Drainage Ditch No. 1 and Drainage Ditch No. 2 is situated in the valley of the Big Sioux river north of the city limits of the city of Sioux Falls in the county of Minnehaha and State of South [fol. 10] Dakota, which city is a municipality of upwards of thirty thousand inhabitants; that the said Big Sioux river flows in a southerly direction through said Townships 101, 102, and 103, north of said Range 49, West of the Fifth Principal Meridian, and that the said city of Sioux Falls is situated in said Township 101; that after entering said township 101 at the northern boundary line thereof the said Big Sioux River flows in a southerly direction to the vicinity of the southern boundary line of said township and then flows in an easterly direction for a distance of some miles and then in a northerly direction through the said city of Sioux Falls and towards the north line of said township and then continues in an easterly direction until it passes out of said Township over the eastern line thereof; that in its course in a northerly direction through the city of Sioux Falls the Big Sioux River passes over a series of falls aggregating approximately ninety feet; that the city water supply of the said city of Sioux Falls is situated in a gravel bed extending over a considerable area in said townships 101 and 102 north of the city of Sioux Falls; that the state

penitentiary of the State of South Dakota is situated north of the said city of Sioux Falls, and that said penitentiary and the lands belonging thereto are situated in said townships 101 and 102.

Eighth

That the said Big Sioux River has its source in Lake Pelican adjoining the city of Watertown in the county of Codington and state of South Dakota, which city of Watertown is situated approximately one hundred miles north of the city of Sioux Falls; that from the said city of Water- [fol. 11] town the said Big Sioux River flows in a generally southerly direction but with many crooks and bends through the counties of Codington, Hamlin, Brookings and Moody to the city of Sioux Falls in the county of Minnehaha; and that the said Big Sioux River during its southward course drainages a large area of territory both eastward and westward of its channel; that there is little fall in said river as it passes through said townships 104, 103, 102, and the northern and west portion- of township 101 and that on either side of said river as it passes through said townships 104, 103 and 102 and the north and west portions of township 101 there is situated for a considerable distance to the eastward and westward of the channel of said river a series of flats which rise but a few feet above the channel of said river.

Ninth

That as originally constructed said Drainage Ditch No. 1 and Drainage Ditch No. 2 emptied into the Big Sioux River through a ditch constructed across the land immediately north of the city of Sioux Falls, which ditch was between the city of Sioux Falls and the gravel bed from which said city obtained its water supply, and emptied into the Big Sioux River in the northeast portion of the city of Sioux Falls and north of the series of falls situated upon said river along its course through the said city of Sioux Falls; that subsequent to the construction of said Drainage Ditch No. 1 and Drainage Ditch No. 2, and about the years 1915 and 1916 the vast volumes of water accumulating as aforesaid in the valley of the Big Sioux River and upon the

lands drained by said Drainage Ditch No. 1 and Drainage Ditch No. 2, caused the outlet of said drainage ditches into [fol. 12] the Big Sioux River, as aforesaid, to wash out a channel upon the land through which said outlet was constructed to such an extent that there arose imminent danger that the course of the Big Sioux River would be changed so that all of the water in the channel of said river would be diverted through said drainage ditches and the outlet thereof, and a new river channel formed by said ditches which would cause the water in said river to cease flowing through its proper and natural channel and over the series of falls in the city of Sioux Falls, and to flow instead through said drainage ditches and the outlet thereof into the Big Sioux River at a point north of the city of Sioux Falls; that such diversion of the channel of the said Big Sioux River threatened to cause enormous damage to property and industrial enterprises in the said city of Sioux Falls situated along the channel of said river, and to destroy the water power obtained from said river at the falls thereof, and also to destroy the municipal water supply of the said city of Sioux Falls by draining the water from the gravel bed from which said municipal water supply is obtained.

Tenth

That the change in the channel of the Big Sioux River into said Drainage Ditch No. 1 and Drainage Ditch No. 2 and through the outlet thereof into the Big Sioux River at a point north of the city of Sioux Falls if the same had been allowed to continue and become permanent would have operated to relieve the lands drained by said drainage ditches and the lands adjacent thereto of the superabundance and surplus of water flowing upon said lands and [fol. 13] that for the purpose of draining the lands adjacent to and drained by said Drainage Ditch No. 1 and Drainage Ditch No. 2 no action of any kind was necessary, excepting to permit the water to flow unhindered through said Drainage Ditch No. 1 and Drainage Ditch No. 2 into the Big Sioux River and to allow a new river channel to be formed by the natural force of the water flowing through the same.

Eleventh

That the board of county commissioners of the said county of Minnehaha for the purpose of avoiding the threatened change in the channel of the Big Sioux River and for the purpose of preventing the drainage of the gravel bed from which the city of Sioux Falls obtains its municipal water supply and for the purpose of preventing the injury to the property owners of the city of Sioux Falls which would be caused by the change in the channel of the Big Sioux River and to prevent the destruction of the water power at the falls of the Big Sioux River in the city of Sioux Falls, caused to be constructed in the summer of the year 1916 various dams and gateways at various places along said Drainage Ditch No. 1 and Drainage Ditch No. 2, made changes in the channel of the Big Sioux River along the course of said drainage ditches and constructed a spillway at the outlet of said drainage ditches into the Big Sioux River; that said construction work was done not for the purpose of bringing about the drainage of agricultural lands, nor for the drainage of any lands for any public use, nor of the lands situated within the drainage area of said Drainage Ditch No. 1 and Drainage Ditch No. 2, nor for the purpose of accelerating the flow of the surplus water from said area, but for the purpose of controlling and retarding [fol. 14] the flow of said water so that the same should not wash out a new channel for the Big Sioux River to the damage and injury of the city of Sioux Falls and of its property owners and to the destruction of its water power and its water supply; that the effect of said work has not been to drain the lands situated in the area of said Drainage Ditch No. 1 and Drainage Ditch No. 2 but to prevent the drainage of said lands by penning up the flood waters upon said lands until they would gradually pass into the Big Sioux River without danger of changing the channel of said river; that in consequence of the construction of said dams, gateways and spillway and of the making of the various cutoffs and changing of the river channel, the lands of the property owners in said drainage area have for the past crop seasons since the year 1915 been greatly damaged and the crops grown thereon have been annually destroy or greatly damaged by reason of water being retained thereon

through the construction of said dams, gateways, and cut-offs, the changing of the river channel and the construction of said spillway; that instead of having been benefited by the construction of said works the lands of the property owners within the area of the drainage district of said Drainage Ditch No. 1 and Drainage Ditch No. 2, as plaintiffs are informed and believe, were decreased fully fifty per cent of the value which the same would have been worth had said work not been done and had said drainage ditches been left as originally constructed.

Twelfth

That there has been expended by the board of county commissioners of said Minnehaha county upon the construction of ditches, dams, gateways and other work as afore-
[fol. 15] said, and upon the construction of said spillway upon the outlet of said Drainage Ditch No. 1 and Drainage Ditch No. 2 a sum in excess of Two Hundred Fifty-five Thousand Dollars for which said sum the said board of county commissioners has issued drainage warrants, and that there is due for principal and interest upon said warrants a sum, as plaintiffs are informed and believe, in excess of Three Hundred Fifty Thousand Dollars; that of said sum of money so spent as aforesaid, by the said board of county commissioners approximately sixty per cent has been expended in the construction of said spillway, dams and retaining gates, designed not for the purpose of the drainage of agricultural lands, but solely for the purpose of controlling and retarding the flow of water, through the outlet of said Drainage Ditch No. 1 and Drainage Ditch No. 2 into the Big Sioux River for the purpose of preventing a change in the channel of said river and of preventing the drainage of the gravel bed from which the said city of Sioux Falls obtains its water supply that, as plaintiffs are informed and believe, more than thirty-five per cent of said moneys expended by the said board of county commissioners has been expended for the purpose of constructing ditches for the straightening of the channel of the Big Sioux River, and that less than five per cent of said moneys has been expended for any purpose legitimately connected with the construction or maintenance of said Drainage

Ditch No. 1 and Drainage Ditch No. 2 as a ditch for the draining of agricultural lands.

Thirteenth

That prior to the construction of said spillway, dams, retaining gates and other work and straightening of the [fol. 16] channel of the Big Sioux River subsequent to the washing out of the outlet to Drainage Ditch No. 1 and Drainage Ditch No. 2 in the years 1915 and 1916, as aforesaid, there was filed in the office of the county auditor of the said county of Minnehaha a purported petition signed by F. L. Blackman and other persons, which said purported petition purported to be a petition "to reconstruct and improve Drainage Ditches No. 1 and No. 2 in Minnehaha county, South Dakota, and to construct a new spillway and outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment upon the property, persons, and corporations benefited thereby"; that thereupon the board of county commissioners of said county of Minnehaha proceeded to establish a new drainage ditch under the name of Drainage Ditch No. 1 & 2, and that the expenditure aforesaid made by the said board of county commissioners of the said Minnehaha county upon the construction of the spillway, dams, retaining gates, and other work as aforesaid were made by said board of county commissioners ostensibly for the construction of drainage works upon a new and independent drainage ditch project, although the same were designed for the drainage of the area formerly intended to be drained by Drainage Ditch No. 1 and Drainage Ditch No. 2 and over the same lines and with the same terminals.

Fourteenth

That prior to the construction of said spillway, dams, retaining gates, ditches and other work the board of county commissioners of said Minnehaha county did not fix the proportion of benefits of the proposed drainage among the lands affected and did not appoint a time and place for the [fol. 17] equalization of the same and did not give notice of said equalization either by publication or posting, and did not make any assessment for the proportioning of benefits against each tract of property affected and did not

make any assessment for the payment of damages caused by the construction of said spillway, dams, retaining gates and ditches and did not provide any moneys for the payment of such damages and did not pay any such damages.

Fifteenth

That prior to the construction of said spillway, dams, retaining gates, ditches and other work, the said board of county commissioners of Minnehaha county did not prepare plans and specifications therefor, and did not file plans or specifications therefor in the office of the county auditor of the said county of Minnehaha, and did not let contracts upon competitive bids for the construction of said spillway, dams, retaining gates, ditches and other work; that prior to the construction of said spillway the said board of county commissioners did advertise for competitive bids for the construction of the spillway in accordance with certain plans therefor; that bids were received by the said board of county commissioners for the construction of a spillway in accordance with such plans, and that the same were rejected by the said board of county commissioners, and subsequently the said board of county commissioners adopted a new and amended plan for the construction of an entirely different form of spillway, and without advertising for bids for such construction made a contract for the construction of said spillway in accordance with said new and amended plan with the Sioux Falls Construction Company, under [fol. 18] which said contract the said Sioux Falls Construction Company constructed such spillway upon the cost plus plan; that under said contract the said Sioux Falls Construction Company was paid the entire cost of the construction of said spillway, together with nine per cent of the total cost added; that the cost of the construction of said spillway under said cost plus plan was, as plaintiffs are informed and believe, upwards of one hundred fifty thousand dollars for which said sum drainage ditch warrants upon said drainage ditches No. 1 and No. 2 were issued by the said board of county commissioners of Minnehaha County to the said Sioux Falls Construction Company, and to other persons.

Sixteenth

That on or about the 20th day of November, 1920, the board of county commissioners of said Minnehaha county entered into a certain contract with Albert J. Chenoweth and Herman Rettenhouse, co-partners as Chenoweth & Rettenhouse, whereby the said board of county commissioners employed the said Chenoweth & Rettenhouse to make a topographical survey showing the lands benefited and subject to assessment for the payment of the cost of said spillway, dams, retaining gates, ditches and other work, and that by said contract the said board of county commissioners agreed to pay the said Chenoweth & Rettenhouse for said survey the sum of Seven Thousand Five Hundred Dollars to be paid in drainage ditch warrants drawn on drainage ditch No-. 1 & 2; that the said Chenoweth & Rettenhouse thereupon proceeded to make a purported survey of [fol. 19] the lands purported to be subject to assessment for the construction of said spillway, dams, retaining gates, ditches and other work; that the said Chenoweth & Rettenhouse made and filed a report with the said board of county commissioners, in which report they made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereunto annexed, marked "Exhibit B" and made a part hereof.

Seventeenth

That on or about the 10th day of June, 1921, the said board of county commissioners of Minnehaha county adopted a purported notice of the time and place for equalizing the proportion of benefits for the construction of said spillway, dams, retaining gates, ditches, and other work and caused the same to be published on July 13, 1921, and on July 20, 1921, in the Sioux Falls Daily Argus-Leader, the official newspaper of the said county of Minnehaha; that a copy of said drainage notice is hereunto annexed, marked "Exhibit C" and made a part hereof; that the total benefits assessed or levied against the various properties described in said notice amounted to a total of 32,-549.62 units, and that the proportion of benefits assessed against the Chicago, Milwaukee & St. Paul Railway Company and its property was as follows:

Chicago, Milwaukee & St. Paul Railway Company, Lot 2 of the Equitable Realty Company's Subdivision of the Northeast Quarter (N. E. ¼) of the Northwest Quarter (N. W. ¼) of Section 16, Township 101, North of Range 49, 2.60 acres 2.00 units.

Chicago, Milwaukee & St. Paul Railway Company, Lots 6 and 7 of Tract 1 of the Northwest Quarter (N. W. ¼) [fol. 20] of Section 16, Township 101, North of Range 49, 3.30 acres 19.00 units.

Chicago, Milwaukee & St. Paul Railway Company station grounds, being that part of the Southeast Quarter (S. E. ¼) of the Northwest Quarter (N. W. ¼) south and west of the right of way of the Chicago, Milwaukee & St. Paul Railway Company occupied by freight house, Section 16, Township 101, North of Range 49, 1.43 acres 7.40 units.

Chicago, Milwaukee & St. Paul Railway Company, Lots 16, and 17, Block 15, Millspaugh's Addition to Sioux Falls, in Section 21, Township 101, Range 49, 1.70 units.

Chicago, Milwaukee & St. Paul Railway Company, Lots 13, 14 and 15, Block 28, Millspaugh's Addition to Sioux Falls, in Section 21, Township 101, North of Range 49, 2.50 units.

Chicago, Milwaukee & St. Paul Railway Company, Lots 5, 6, 7, 8 and 9 of Block 25 of J. L. Phillips' Sioux Falls in Section 16, Township 101, North of Range 49, 21.45 units.

Chicago, Milwaukee & St. Paul Railway Company, all of Block 9 of Daniel's Addition to Sioux Falls in Section 22, Township 101, North of Range 49, 1.92 units.

Chicago, Milwaukee & St. Paul Railway Company, benefits to right of way, tracks, embankments, and bridges across sections 4, 9, 16, 21, and 22, Township 101, Range 49, West of the Fifth Principal Meridian, and across Sections 4, 9, 16, 21, 28 and 33, Township 102, Range 49, West of the Fifth Principal Meridian, and across Sections 5, 8, 17, 20, 29, and 33, Township 103, Range 49, West of the Fifth Principal Meridian, and across Section 32, Township 104, Range 49, West of the fifth Principal Meridian, within the drainage area, 1,678.90 units.

[fol. 21] That the total proportion of benefits levied or assessed pursuant to said notice upon the said Chicago, Milwaukee & St. Paul Railway Company is a total of 1734.87 units; that upon the basis of such apportionment of

benefits the assessment against the property of the Chicago, Milwaukee & St. Paul Railway Company would be in excess of $26,023.05.

Eighteenth

That on or about the 25th day of July, 1921, the said Chicago, Milwaukee & St. Paul Railway Company filed in the District Court of the United States for the District of South Dakota and the Southern Division thereof its bill of complaint against the county commissioners, the auditor, and the treasurer of the said Minnehaha county praying that the acts of the board of county commissioners of the said county of Minnehaha aforesaid in connection with the construction of said spillway, dams, retaining gates, and ditches be adjudged to be illegal and void, that no apportionment of benefits or assessment of damages ever be made against said Chicago, Milwaukee & St. Paul Railway Company or its property therefor, and that the said county commissioners and auditor be restrained and enjoined from making any assessment against the said Chicago, Milwaukee & St. Paul Railway Company or its property for the cost of said work, and that the treasurer of the said county of Minnehaha be forever enjoined and restrained from filing any assessment and from collecting any assessment against the property of the said Chicago, Milwaukee & St. Paul Railway Company for the construction of said spillway, dams, retaining gates, and ditches; that service was made upon the several defendants in said suit brought as aforesaid by the said Chicago, Milwaukee & St. Paul Rail-
[fol. 22] way Company, and issue was duly joined therein; that thereafter various holders of warrants issued by the said board of county commissioners of the said county of Minnehaha in payment for the cost of the construction of said spillway, dams, retaining gates, and ditches and other work intervened in said suit and became parties thereto; that said suit was duly brought on for hearing before the said District Court and upon the 2nd day of March, 1922, a decree entered therein in the office of the Clerk of said District Court perpetually restraining and enjoining the defendants in said suit, their agents, servants, employees, attorneys, and successors in office, and each and every of them, from making any apportionment of benefits upon the

said Chicago, Milwaukee & St. Paul Railway Company or upon any property belonging to said company (other than upon such property of the plaintiff as may have theretofore been assessed for the original construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2 of Minnehaha county, South Dakota) for the construction of a spillway, dams, retaining gates, ditches, or for all other work done or that may hereafter be done in the matter of the construction or reconstruction, repair or maintenance of drainage Ditch No. 1 and Drainage Ditch No. 2 or of said ditches under the designation of "Drainage Ditches No. 1 and No. 2" or as "Drainage Ditch No. 1 & 2" of Minnehaha county, South Dakota, and perpetually restraining and enjoining said county commissioners from making any assessment upon said property or any parcel or portion thereof for the cost of the construction or reconstruction, repair or maintenance of said spillway, dams, retaining gates, ditches, and other work theretofore done or which may hereafter be done upon said drainage ditches or any of them, and from in any [fol. 23] manner including any of the property of the said Chicago, Milwaukee & St. Paul Railway Company (other than the property originally assessed for the construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2) within the territory benefited by said drainage ditches, or of either of them; that by said decree it was further ordered, adjudged and decreed that the auditor of the said county of Minnehaha be restrained from making any such apportionment of damages or from making or levying any such assessment upon the said Chicago, Milwaukee & St. Paul Railway Company, and that the treasurer of the said county of Minnehaha be restrained and enjoined from filing any such assessment and from collecting any such assessment against the property of the plaintiff, the Chicago, Milwaukee & St. Paul Railway Company; that it was further decreed that said decree be and is declared to be without prejudice to any of the rights of the Chicago, Milwaukee & St. Paul Railway Company to object to any apportionment of benefits for the construction of said spillway, dam, retaining gates, or ditches, or other work theretofore done or that thereafter be done in the matter of the construction or reconstruction, repair or maintenance of Drainage Ditch No. 1 or of Drainage Ditch No. 2, or of the drainage ditches No.

1 and 2, or of drainage ditch No. 1 & 2, of Minnehaha County, South Dakota, upon any of the property of the Chicago, Milwaukee & St. Paul Railway Company which may heretofore have been assessed for the original construction of said Drainage Ditch No. 1 or of said Drainage Ditch No. 2, and without prejudice to any and all rights of the Chicago, Milwaukee & St. Paul Railway Company to contest any such apportionment of benefits or any assess-
[fol. 24] ment which may be made under any such apportionment of benefits or any act of the board of county commissioners of said county of Minnehaha in the construction of said spillway, dams, retaining gates, ditches, and other work heretofore done or which may hereafter be done by and under the supervision of the board of county commissioners of the said county of Minnehaha in the matter of the construction, reconstruction, repair or maintenance of said Drainage Ditch No. 1 or of said Drainage Ditch No. 2 or of said drainage ditches No. 1 and 2 or of said drainage ditch No. 1 & 2; that a copy of said decree is hereunto annexed, marked "Exhibit B" and made a part hereof.

Nineteenth

That thereafter an appeal was duly taken to the Circuit Court of Appeals of the United States for the Eighth Circuit by the defendants and by the intervening defendants from said decree, "Exhibit D" aforesaid, and upon the 18th day of March, 1924, a decree was entered in the said United States Circuit Court of Appeals for the Eighth Circuit affirming the said decree, "Exhibit D," of the said District Court; that thereafter an appeal was taken to the Supreme Court of the United States from said decree of the United States Circuit Court of Appeals for the Eighth Circuit and upon the hearing upon said last appeal in the Supreme Court of the United States the said decree of said Circuit Court of Appeals was affirmed upon the 1st day of March, 1926.

Twentieth

That the only property of the Chicago, Milwaukee & St. Paul Railway Company situated within the original assess-
[fol. 25] ment area of Drainage Ditch No. 1 and the only

property of said Chicago, Milwaukee & St. Paul Railway Company which was assessed for the original construction of said Drainage Ditch No. 1 consisted of the following described tracts or parcels of property, to-wit:

Right of way as laid out and located across Sections 28, 29, and 31, Township 103, Range 49, West of the Fifth Principal Meridian, 25.02 acres;

Also, right of way as now laid out and located across Sections 4, 9, 16, 21, 28 and 33, Township 102, Range 49, West of the Fifth Principal Meridian, Sioux Falls & Egan line, 72.50 acres;

Also, right of way as now laid out and located across Sections 5, 8 and 9, Township 102, Range 49, West of the Fifth Principal Meridian, (Sioux Falls & Madison line) 17.30 acres;

Also, right of way as now laid out and located across Sections 4 and 9, Township 101, Range 49, West of the Fifth Principal Meridian, 17.05 acres.

That the only property of the Chicago, Milwaukee & St. Paul Railway Company situated within the original assessment area of Drainage Ditch No. 2 and the only property of said Chicago, Milwaukee & St. Paul Railway Company which was assessed for the original construction of said Drainage Ditch No. 2 consisted of the following described tracts or parcels of property, to-wit:

Right of way as laid out and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28 and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103, Range 49, and Section 32, Township 104, Range 49, West of the Fifth Prin-
[fol. 26] cipal Meridian, within the drainage area (the above being the Sioux Falls and Egan line) and across Sections 5, 8 and 9, Township 102, Range 49, West of the Fifth Principal Meridian, within the drainage area (being the Renner & Madison line) total 14.5 miles 167.06 acres.

Twenty-first

That, excepting the property in the last paragraph herein described, no part, parcel, or portion of the property belonging to the said Chicago, Milwaukee & St. Paul Railway Company and described in said notice, "Exhibit C,"

formed a part of the original assessment area of said Drainage Ditch No. 1 and of said Drainage Ditch No. 2 for which an assessment was made at the time said ditches were originally constructed, and that all other property belonging to said Chicago, Milwaukee & St. Paul Railway and mentioned in said notice, "Exhibit C" consists of property upon which an apportionment of benefits was sought to be made for the first time by said notice, "Exhibit C," and consist of property, the making of an assessment upon which has been perpetually enjoined by said decree of the District Court of the United States for the District of South Dakota, affirmed, as aforesaid, by the decree of the Circuit Court of Appeals for the Eighth Circuit, and by the decision of the Supreme Court of the United States.

Twenty-second

That the plaintiffs, as receivers as aforesaid of the Chicago, Milwaukee & St. Paul Railway Company, are engaged in the operation of a line of railroad in the said county of [fol. 27] Minnehaha and state of South Dakota; that all of the property of said railroad in said county of Minnehaha consists of its right of way, station grounds, line of railroad, bridges, culverts, rolling stock, and other property employed in the maintenance and operation of its line of railroad; that said Chicago, Milwaukee & St. Paul Railway Company is not and was not at the time of the construction of said spillway and other works pertaining to Drainage Ditch No. 1 and 2, or at any time subsequent thereto, the owner of any agricultural land in said county of Minnehaha other than that required for its right of way; that it is not engaged in any other agricultural operations and that the construction of said spillway, dams, retaining gates, ditches, and other works done, as aforesaid, by the board of county commissioners of the said county of Minnehaha, conferred no benefits upon the said Chicago, Milwaukee & St. Paul Railway Company or its property; that no notice other than "Exhibit C" has ever been given of the equalization of benefits upon the property of the property owners claimed to have been benefied by the construction of said spillway, dams, ditches, and other works in connection with said Drainage Ditch No. 1 and 2, excepting certain notices published prior to the publication of said

"Exhibit C," and which were subsequently abandoned by the said board of county commissioners of the said county of Minnehaha; that no notice has ever been published giving or stating a description of every tract of land affected by the proposed drainage and the names of the owners of the several tracts of land, as appears from the records of the office of the register of deeds at the date of the filing of the petition, and the proportion of benefits fixed for each tract of property; that no notice has ever been given or published [fol. 28] giving a description of each tract of land belonging to the said Chicago, Milwaukee & St. Paul Railway Company affected by the proposed drainage or the proportion of benefits fixed for each tract of property belonging to said railway company.

Twenty-third

That this action is a suit of a civil nature to resist and prevent an assessment upon the property of plaintiff under the pretended authority of a purported act of the Legislature of the state of South Dakota claimed by plaintiffs to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000) and is the amount of said purported assessment, to-wit: a sum in excess of Twenty-six Thousand Dollars ($26,000).

That the costs of the board of county commissioners of said Minnehaha County in constructing said spillway, dams, retaining gates, and ditches, were unauthorized under the constitution and laws of the state of South Dakota, and that the same have never been approved by the State Engineer of the state of South Dakota; that no benefits have accrued to the Chicago, Milwaukee & St. Paul Railway Company or its property by the construction of said spillway, dams, retaining gates, and ditches and by the other work done as aforesaid upon the property, in the drainage area of said Drainage Ditch No. 1 and Drainage Ditch No. 2 but that the same have been and are a positive damage to the property of the Chicago, Milwaukee & St. Paul Railway Company.

[fol. 29] Twenty-fourth

That no notice has ever been given by the board of county commissioners of said Minnehaha County of the apportionment of benefits for the construction of said spillway, dams, retaining gates, ditches, and other work heretofore or that may hereafter be done by the board of county commissioners of said Minnehaha county upon said Drainage Ditch No. 1 and 2 upon the property of the said Chicago, Milwaukee & St. Paul Railway Company heretofore assessed for the original construction of said Drainage Ditch No. 1 and of said Drainage Ditch No. 2, and that in said notice, "Exhibit C" there is contained no apportionment of benefits upon said property excepting said apportionment of 1678.90 units upon said Chicago, Milwaukee & St. Paul Railway Company for benefits to right of way, tracks, embankments, and bridges across various tracts of land in townships 101, 102, 103, and 104 range 49, west of the Fifth Principal Meridian, the major portion of which said property consists of property of said Chicago, Milwaukee & St. Paul Railway Company situated outside of the area and property heretofore assessed for the original construction of said Drainage Ditch No. 1 and of said Drainage Ditch No. 2; that there is nothing in said notice, "Exhibit C" contained nor in the proceedings of the said board of county commissioners of the said county of Minnehaha with respect to the apportionment of benefits for the construction of said spillway, dams, retaining gates, ditches, and other work by which it can be determined by the plaintiffs or by said board of county commissioners or by anyone else interested the amount of the apportionment of benefits upon the property of the said Chicago, Milwaukee & St. Paul Railway Company assessed for the original [fol. 30] construction of said Drainage Ditch No. 1 or of said Drainage Ditch No. 2 and amount of the apportionment upon the other property of said railway company not so assesed; that under said notice, "Exhibit C," it would be impossible for the said board of county commissioners of the said county of Minnehaha to apportion the benefits to the Chicago, Milwaukee & St. Paul Railway Company for the construction of said spillway, dams, retaining gates, ditches and other work upon such property of the said

railway company as may heretofore have been assessed for the original construction of said Drainage Ditch No. 1 or of said Drainage Ditch No. 2.

Twenty-fifth

That the day of hearing specified in said notice, "Exhibit C," was the 1st day of August, 1921; that upon the said return day of said notice, August 1, 1921, no proceedings were had by said county commissioners of the said county of Minnehaha under said notice excepting to adjourn the hearing thereunder to a later date; that subsequently further action was taken by the said board of county commissioners purporting to adjourn and continue said hearing from time to time to various dates, but that upon several of the dates to which said hearing was purported to have been continued no meetings were held by the said board of county commissioners and no action taken under said notice and that by the failure to hold such meetings and by the failure to act upon the return day of said notice, the 1st day of August, 1921, or upon the dates to which said hearing was adjourned or continued by said board, the said [fol. 31] board of county commissioners lost jurisdiction to take any further proceedings or action under said notice; that notwithstanding such loss of jurisdiction the said board of county commissioners of the said county of Minnehaha pretend to have again adjourned said hearing until the 9th day of July, 1927, and are threatening that upon said 9th day of July, 1927, they will take action pursuant to said notice making final the apportionment of benefits upon the various property owners mentioned in said notice, including the said Chicago, Milwaukee & St. Paul Railway Company, and will levy an assessment against said property owners, including said Chicago, Milwaukee & St. Paul Railway Company, for the alleged benefits apportioned to them severally by said notice; that, as plaintiffs are informed and believe, the said board of county commissioners are intending at said meeting on July 9, 1927, either to make an apportionment of benefits upon the property of the said Chicago, Milwaukee & St. Paul Railway Company held by plaintiff as a part of their receivership estate pursuant to said notice, "Exhibit C," and in violation of said decree of this court, "Exhibit D," or to make an arbitrary appor-

tionment of benefits either of the number of units specified in said notice, "Exhibit C" and apportioned to the said Chicago, Milwaukee & St. Paul Railway Company or in some other arbitrary number of units upon the property of the Chicago, Milwaukee & St. Paul Railway Company held as a part of the receivership estate of plaintiffs, and upon which an assessment was heretofore levied for the original construction of said Drainage Ditch No. 1 and of said Drainage Ditch No. 2, and to make such arbitrary apportionment of benefits regardless of the fact that no apportionment of benefits upon said property has ever been made and no notice thereof ever published.

[fol. 32] Twenty-sixth

That said purported statute of the state of South Dakota, "Exhibit A" hereto, is unconstitutional and void in that it is in violation of the Fourteenth Amendment to the Constitution of the United States; that said statute, "Exhibit A," is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property *and* property owners situated in the drainage area and especially in that said purported statute furnishes no fixed nor determinable basis for the apportionment of benefits upon the property of railroad companies or other corporations and upon the property of municipal or quasi-municipal corporations, and upon platted property in cities or villages; that said purported law, "Exhibit A," is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owners to be heard thereon and without notice of any character to the property owners; that said purported law, "Exhibit A," is further unconstitutional and void in that no notice to property owners is required before a drainage assessment area is established or the work constructed; that if said apportionment of benefits be made as threatened by the said board of county commissioners of the said county of Minnehaha and as provided in said notice, "Exhibit C," that the same will constitute the taking of the property of plaintiffs and of the other property owners affected by said notice without due process of law; that a cloud will be

placed upon the title of plaintiffs to the real property belonging to their receivership estate situated within said drainage area affected by said notice, "Exhibit C," and that there will result a multiplicity of suits and that plaintiffs and the other property owners affected will suffer ir-
[fol. 33] reparable injury; that the equalization of benefits fixed by the board of county commissioners of Minnehaha County, South Dakota as shown by the notice, "Exhibit C" hereto, against the property of the said Chicago, Milwaukee & St. Paul Railway Company is wholly speculative, arbitrary, unjust, illegal and discriminatory, and was made by the board of county commissioners of said county of Minnehaha without any reasonable or rational basis therefor and is not in proportion to any benefit which the property of the Chicago, Milwaukee & St. Paul Railway Company has ever received or ever can receive by the rebuilding of the spillway and the cleaning out, repairing, and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2; that the property of the said Chicago, Milwaukee & St. Paul Railway Company has not and never can be benefited by the work performed by the said board of county commissioners as herein set forth to the extent of Twenty-six Thousand Dollars ($26,000), or to any extent whatever, and that the assessments sought to be made upon the property of the Chicago, Milwaukee & St. Paul Railway Company as above set forth is out of all proportion to the assessments sought to be levied upon and collected from the agricultural lands situated north of the city of Sioux Falls and within the drainage area of said Drainage Ditch No. 1 and Drainage Ditch No. 2; that the said equalization of benefits is so arbitrary and discriminatory against the property of the Chicago, Milwaukee & St. Paul Railway Company as to deprive said railway company and the plaintiffs of their property without due process of law and to deprive the plaintiffs of the equal protection of the law; that plaintiffs have no plain, speedy or adequate remedy at law.

[fol. 34] Wherefore, plaintiff- prays that the defendants and each of them, their agents, servants, employees, attorneys, and successors in office and each and every of them, be forever restrained and enjoined from proceeding further in the making of an apportionment of benefits upon the property of the Chicago, Milwaukee & St. Paul Railway

Company now held by plaintiffs as a portion of their receivership estate for the construction of said spillway, dams, retaining gates, ditches, and for the other work done, as aforesaid, by the board of county commissioners of the said county of Minnehaha in the assessment area of said Drainage Ditch No. 1 and said Drainage Ditch No. 2, and restrained and enjoined from making any assessment upon the property of said Chicago, Milwaukee & St. Paul Railway Company (the same being a portion of the receivership estate of the plaintiffs) for the cost of the construction of said spillway, dams, retaining gates, ditches, or other work, or any part thereof, and from proceeding in any manner under said purported statute, "Exhibit A," in the construction of any work in the area of said Drainage Ditch No. 1, said Drainage Ditch No. 2, or said purported Drainage Ditch No. 1 & 2, and from doing any act looking towards an apportionment of benefits for any work heretofore done in the area of said Drainage Ditch No. 1 and Drainage Ditch No. 2 and Drainage Ditch No. 1 & 2, and from doing any act tending towards the making of any assessment for the cost of any such work heretofore done, and from in any manner proceeding under said purported law, "Exhibit A," in the doing of any work in the area of said Drainage Ditch No. 1, Drainage Ditch No. 2, or Drainage Ditch No. 1 & 2; that the defendant, Dale E. Howe, as auditor of the [fol. 35] said county of Minnehaha his deputies and assistants and his successors in office, be forever restrained and enjoined from making any apportionment of benefits for work done as aforesaid in the area of Drainage Ditch No. 1, Drainage Ditch No. 2, or of Drainage Ditch No. 1 & 2, and from making or filing any assessment therefor upon the property of the Chicago, Milwaukee & St. Paul Railway Company, or upon the property held by plaintiffs as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, and from certifying any assessment therefor to the county treasurer of the said county of Minnehaha; that the defendants, A. G. Risty, Chris Olson, L. E. Larson, Fletcher Alguire, and William Stringham, as county commissioners of the said county of Minnehaha, and their successors in office, be forever restrained and enjoined from fixing a proportion of benefits for the construction of said spillway, dams, retaining gates, and ditches upon the property of the

Chicago, Milwaukee & St. Paul Railway Company, upon the property held by plaintiffs as receivers of said Chicago, Milwaukee & St. Paul Railway Company, and upon the property of the other property owners named in said notice, "Exhibit C," and be forever restrained and enjoined from making any assessment against plaintiffs or the property held by them as receivers of the Chicago, Milwaukee & St. Paul Railway Company, as aforesaid, or against the property of any other property owner in the area of said Drainage Ditch No. 1, Drainage Ditch No. 2, and Drainage Ditch No. 1 and 2 for the cost of said work; that the defendant, Fred A. Mundt, as treasurer of Minnehaha County, South Dakota, his deputies and assistants and his successors in office and each and every of them be forever re-
[fol. 36] strained and enjoined from filing any assessment and from collecting any assessment against the property belonging to the receivership estate of the plaintiffs, or against the property of the other property owners named in said notice "Exhibit C," upon any assessment for the construction of said spillway, dams, retaining gates and ditches; that the said purported statute of said state of South Dakota, "Exhibit A," hereto, be adjudged and decreed to be unconstitutional and void; that all acts of the said board of county commissioners of the county of Minnehaha and of the state engineer of the state of South Dakota heretofore done in connection with the construction of said spillway, dams, retaining gates, and ditches be adjudged to be illegal and void; that it be adjudged and decreed that no benefits have resulted to the plaintiffs or to their receivership estate from the construction of said spillway, dams, retaining gates, and ditches, and that no apportionment of benefits or assessment of damages therefor ever be made against plaintiffs or against the property belonging to their receivership estate.

That pending the issuance of a perpetual injunction herein this Honorable Court grant an interlocutory injunction herein restraining the defendants herein, their deputies, agents, servants, and employees and each and every of them, from doing any of the above mentioned acts until the final hearing herein, or until the further order of this Court; that before the hearing and determination of plaintiffs' application for an interlocutory injunction this Court

grant a temporary restraining order restraining the said defendants, their agents and servants, and each and every [fol. 37] of them, from doing any of the above mentioned acts until the hearing and determination of plaintiffs' application for an interlocutory injunction herein.

The plaintiffs further pray that a subpœna of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, A. G. Risty, Chris Olson, L. E. Larson, Fletcher Alguire, and William Stringham, individually and as county commissioners of the county of Minnehaha in the state of South Dakota, and to Dale E. Howe, individually and as county auditor of said Minnehaha county, and to Fred A. Mundt, individually and as treasurer of said Minnehaha county, thereby commanding them and each of them on a day certain, therein to be named, to be and appear before this Honorable Court and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular, the premises and to perform and abide by such order, direction or decree as may be made in the premises, and that on final hearing hereof said order of injunction may be made permanent. Plaintiffs further pray for such other and further relief as shall to the Court seem just, proper and equitable and for its costs and disbursements herein.

Bailey & Voorhees and Hepperle & Fuller, solicitors for plaintiff. H. H. Field, O. W. Dynes, of counsel.

[fol. 38] *Duly sworn to by Edward J. Brundage. Jurat omitted in printing.*

EXHIBIT "A" TO BILL OF COMPLAINT

Chapter 98 of the Session Laws of 1905, as amended and reenacted as Chapter 134 of the Session Laws of 1907, and as amended and reenacted as Sections 8458 to 8491 of the South Dakota Revised Code of 1919, and as amended at the Second Special Session of the Sixteenth Legislature of the State of South Dakota.

(Note: The section numbers at the beginning of each paragraph are those of the South Dakota Revised Code of 1919. The references at the end of each paragraph are to the session laws of the various years.)

[fol. 39] #8458. Power of County Commissioners.—The Board of County Commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural land. (#1, ch. 98, 1905; #1, ch. 134, 1907).

#8459. Petition.—Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. The petition shall be accompanied by a bond with sufficient sureties to be approved by the county auditor, conditioned to pay all expenses incurred in case the board does not grant the petition or the same is denied on appeal. Such petition may be presented at any regular or special meeting of the board, and, if sufficient in form shall, be ordered filed with the county auditor. (#2, ch. 98, 1905; #2, ch. 134, 1907).

#8460. Inspection of Proposed Route.—It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together [fol. 40] with the board of county commisioners shall as soon as practicable, inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such su-vey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and assessment of its cost, or as much less as the board may require. Such survey may extend to other lands than those affected by the proposed drainage

for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. For the purpose of inspection or surveys, the county commissioners, surveyors or their employes may enter upon any lands traversed by the proposed drainage or in their judgment likely to be affected thereby. The county auditor shall promptly furnish the state engineer with a copy of the surveyor's report mentioned in the succeeding section and of all maps and plans filed by such surveyor and also with a copy of such further files as the state engineer may ask for. In case the drainage is established the preparation of plans and specifications upon which the contract of construction is to be awarded and also the work of construction, shall be under the supervision of the state engineer. It shall be the duty of the state engineer to render such assistance and advice to the board of county commissioners in regard to such drainage as the duties of his office will permit and he shall be reimbursed by such board [fol. 41] for his expenses incident thereto: provided, that in case of minor ditches the state engineer shall not be required to attend with the board of county commissioners at the first inspection, nor to perform subsequent services if in his judgment it shall not be necessary for him so to do. (#3, ch. 98, 1905; #3, ch. 134, 1907; #1, ch. 102, 1909).

#8461. Surveyor's Report—Notice of Hearing.—The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears

from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and [fol. 42] shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing. (#4, ch. 98, 1905, #4, ch. 134, 1907; #2, ch. 102, 1909).

#8462. Hearing on Petition.—At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. After full hearing the drainage may be established along the line set forth in the petition or in the finding of the board prior to the hearing, or the board may vary the route thereof, or its width, as deemed practicable or necessary. If the board deems it best to vary the route, or to materially change the initial or terminal points of such proposed drainage so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing. No open ditch shall be constructed within the limits of any public highway except where the topography of the country makes such construction advisable and in such case the ditch shall be located at a sufficient distance from the center of such highway to permit a roadway of standard width being constructed. If the proposed drainage does not give sufficient fall to drain the lands sought to be drained or will not properly take care of the waters collected by such drainage, the same shall be extended so as to secure the drainage or properly dispose of the water. The hearing in any such case shall be adjourned and notice given to all parties newly [fol. 43] affected as in case of the original hearing. When the board of county commissioners shall have fully heard and considered such petition, and all matters in opposition to or in support of the same, it shall, if it finds the pro-

posed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition, the petitioners to be jointly and severally liable for the costs of the proceedings, the same to be recovered in a civil action. If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimants right to have the same assessed by the jury. Such drain shall be given a name and the proceeding thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office. (#5, ch. 98, 1905; #5, ch. 134, 1907; #3, ch. 102, 1908; #1, ch. 205, 1917).

[fol. 44] #8463. Equalization of Benefits.—After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any par-

ticular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed. (#6, ch. 98, 1905; #6, [fol. 45] ch. 134, 1907; #4, ch. 102, 1909).

#8464. Assessments.—After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. The cost of establishment shall include the costs of the service of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all other expenses incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage. At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same will be so filed, by publication at least once each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delin-

quent, together, with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable [fol. 46] and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States, and if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at a rate not to exceed eight per cent per annum payable annually. Such assessment shall be paid to and received by the county treasurer and paid over to the holders of the assessment certificates or upon the order of the board of county commissioners. The board of county commissioners may issue separate assessment certificates against each tract assessed for the amount of the assessment thereon and may sell the same at not less than par value with all accrued interest or may contract to pay for the construction of such drainage with such assessment certificates or with warrants. Such assessment certificates shall refer to the record in the office of the county auditor of the order of assessment and of the filing of a copy thereof in the county treasurer's office, shall transfer to the holder all interest, claim, or right in or to such assessment, bear the same rate of interest, carry the lien of such assessment and be enforci-ble as provided by law. Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale, provided that no such assessment or installment thereof shall be included in the sale of any given year unless the same shall have been delinquent on or before August first of each year. The provisions of Chapters 7, 8, 9, Part 9 of this title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable, except that a treasurer's deed issued upon a delinquent drainage assessment [fol. 47] shall recite the fact that the title conveyed is subject to all the claims which the state or any political subdivision thereof may have thereon for annual taxes.

Whenever an assessment for drainage or an installment thereof has been made against any county, city, town or township, as provided in this chapter, the officers of such

county, city, town or township, whose duty it is under the law to make the levy of taxes, shall at the time of the next annual tax levy after the making of such assessment make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment, and return the same to the proper officers as provided by — for *the* other taxes, and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes; provided, that any surplus remaining in any fund at the close of any year may be used by any township to pay and apply on any drainage assessment, as provided herein; provided, further, that in unorganized townships the county commissioners shall be authorized to pay for drainage as provided herein out of any money belonging to such unorganized township, and each succeeding year a like levy shall be made by such authorities until the whole of such assessment for drainage is paid. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at a rate not to exceed eight per cent per annum payable annually, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any dam- [fol. 48] ages allowed and cost of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage. (#7, ch. 98, 1905; #7, ch. 134, 1907; #5, ch. 102, 1909; ch. 130, 1911, and as amended by #1, ch. 46, Laws of Second Special Session of the Sixteenth Session of the Legislature of South Dakota 1920).

#8465. Bids—Specifications—Contracts.—Whenever sufficient money shall have been collected the damages occasioned by the construction of such drainage and fixed as herein provided shall be paid and thereupon the board of county commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same. Such contracts may require the contractors to take their pay in assessment certificates or in warrants to be thereafter issued. The contract may be for the construction of

the entire drainage or for any portion thereof and shall be let upon competitive bids, the board reserving the right to reject any and all bids. The lowest responsible and capable bidder shall be accepted but if any landowner affected be an equally low, capable and responsible bidder with a nonowner of the lands affected the former shall be preferred. When any contract shall be let the contractor shall give a bond in such sum as shall be approved by the board of county commissioners, conditioned for the faithful performance of his work and full completion of his contract to the satisfaction of such board. For the information of the contractors in bidding upon the proposed drainage, full plans and specifications shall be filed in the office [fol. 49] of the county auditor. If in the judgment of the board of county commissioners the entire drainage or any part thereof can be constructed for less money than the amount of any bid submitted therefor, the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary material for such construction, without letting contracts therefor. Contracts for building bridges or culverts rendered necessary by the construction of such drainage may be let separately and after the drainage is completed. The cost of constructing such bridges or culverts shall be charged in the first instance as part of the cost of drainage and thereafter such bridges and culverts shall be maintained as part of the highway; provided, that the cost of removing, repairing, enlarging or replacing bridges and culverts already existing across the line of a proposed drainage ditch shall not be charged as a part of the drainage (#8, ch. 98, 1905; #8, ch. 134, 1907; #6, ch. 102, 1909; ch. 206, 1917).

#8466. Board May Extend Time for Completion of Contract.—The board of county commissioners shall have power to grant a reasonable extension of time for the completion of any contract. When any contract shall not be finished within the time specified or to which it may be extended, such board may in its discretion at any time thereafter relet such unfinished portion of any part thereof after not less than five days' notice thereof to the lowest responsible bidder and shall take security as for the original contract. The cost of completing such parts, over

and above the original contract price and the expense of notices and reletting, shall be collected by the board from the first contractor; provided, that in no case shall the [fol. 50] board forfeit and annul a contract without five days' notice to the contractor, if found, and if not found then by written notice left at his last known place of residence in the county (#9, ch. 98, 1905; #9, ch. 134, 1907).

#8467. Assessments for Further Costs.—At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction. including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessments and certificates. The board of county commissioners may sell such assessment certificates at not less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants only one assessment need be made. In any case, in the discretion of the board, several assessments may be [fol. 51] made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners, for the purpose of the particular drainage (#10, ch. 98, 1905; #10, ch. 134, 1907; #7, ch. 102, 1909).

#8468. Acceptance of Drainage by Board. After the work of construction shall have been fully completed and approved by the state engineer, the drainage may be accepted by the board of county commissioners, by order duly made, and payment shall be made therefor unless in the discretion of the board of county commissioners agreement be made for the partial payments; provided, that final payment shall not be made until the expiration of thirty days after the acceptance of the work and in case an appeal has been taken from the order accepting such work final payment shall not be made until the determination of such appeal; provided, further, that no payment shall be made to any engineer whose employment has not been approved by the state engineer, and no payment shall be made upon any contract for the construction of any such drainage project, unless the same shall have been constructed under the supervision of the state engineer; and provided, further, that nothing in this section shall apply to minor drainage projects. All claims for compensation or expenses for publishing legal notices or supervising the construction of any such drainage project including the per diem and the mileage of the county commissioners, shall be paid from the general fund of the county, and for all such payments the county treasurer shall reimburse the general fund from the assessments herein provided for. (#11, ch. 98, 1905; #11, ch. 134, 1907; #8, ch. 102, 1909; ch. 207, 1917.)

[fol. 52] #8469. Appeals. An appeal shall lie for any final order or determination of the board of county commissioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage to the circuit court of the county in which such drainage is located by any one deeming himself aggrieved by any such order or determination. Written notice of such appeal shall be served upon the board of county commissioners and a bond conditioned to pay all the costs of such appeal, in case the contention of appellant be not sustained in some respect, shall be filed in the office of the clerk of courts, to be approved by him in such amount and with such sureties as

he deems necessary. Upon the service of such notice and the filing of such bond, the county auditor shall transmit to the clerk of courts the petition and all other papers and records in the matter or certified copies thereof, when the convenience of the auditor's office would be seriously impaired by the transmission of the original records, and such matter shall be heard as an original action in the circuit court. No appeal shall operate as a stay of proceedings by the board of county commissioners, but the court may upon the taking of an appeal, for good cause shown issue an order staying the further proceedings by the board of county commissioners until the hearing and determination of such appeal. Before granting such stay, the court shall require an undertaking in sufficient amount and with sufficient surety to the effect that if the order appealed from [fol. 53] be sustained the person upon whose motion the stay is granted shall pay all damages caused by the issuance of such order of stay. Any number of persons interested may join in the same appeal. Appeals shall be in all cases taken within thirty days from the making of the order or determination appealed from. If, on the trial of such action, it be determined that the drainage as petitioned for and established by order of the board is not conducive to the public health, convenience or welfare or is not necessary or practicable for the purpose of draining agricultural lands, the petitioners shall be jointly and severally liable for all the costs thus far incurred. If the contention of the appellant as to the amount of damages or proportion of benefits, the acceptance of the drainage of the practicability of the drainage when the route thereof is varied by the county commissioners over the protest and objection of the petitioners, be sustained in whole or in part, the costs of such trial shall be part of the cost of the drainage. Upon an appeal from an assessment of benefits, the court of jury shall consider not only the relative benefits, to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not; if benefited, to what extent. (#12, ch. 98, 1905; #12, ch. 134, 1907; #9, ch. 102, 1909.)

#8470. Assessments for Maintenance. For the cleaning and maintenance of any drainage established under the

provisions of this article, assessments may be made upon the landowners affected in the proportion determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection [fol. 54] by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and assessments and certificates shall be liens, interest-bearing, and perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance or may be collected directly by the board of county commissioners. (#13, ch. 98, 1905; #13, ch. 134, 1907.)

#8471. Assessments Paid in Installments. The owner of any tract of land against which an assessment for drainage is made, who shall, within thirty days after the making of such assessment, file with the county auditor an agreement in writing that in consideration of the right to pay his assessment in installments he will not make any objections to the illegality or irregularity of his assassment, if any there be, and will pay the same with interest as fixed by the board of county commissioners, shall have the privilege of paying such an assessment in ten annual installments, interest payable annually. Assessment certificates shall not issue until after the expiration of the period of filing such agreements with the county auditor, and when issued for assessments to be payable in installments may be issued in coupon form. The first installment shall be payable within ten days after a certified copy of the assessment has been filed, in the office of the county treasurer, and subsequent installments shall be payable one, two, three, four, five, six, seven, eight and nine years from the date of such assessment, re- [fol. 55] spectively, with interest on the whole sum unpaid payable annually at maturity of the several installments. Such subsequent installments shall become delinquent after the expiration of thirty days from the time the same are payable and thereupon a penalty of five per cent shall attach thereto. Provided, that where bonds shall have been issued for the construction of such drainage, as provided in Section 8472, such assessments shall be made payable in

installments sufficient to meet the payment on the bonds, as the same shall become due. Payments of assessments may at any time be received and full discharge thereof given by the county treasurer to any property holder, but after issue of bonds, such payment of assessments can be received only according to the terms of such bonds. (#14, ch. 98, 1905; #14, ch. 134, 1907; #10, ch. 102, 1909.)

#8472. Board May Issue Bonds. The board of county commissioners, whenever it has ordered the establishment of any drainage, shall have authority by resolution to be spread upon its records, to provide for the issuance of bonds in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in obtaining the right of way or in locating or constructing any such drainage. Such word "expenses" shall be construed to mean and cover every item of cost of such drainage from its inception to its completion, such bonds to be payable only out of the funds to be derived from special assessments upon the lands benefited thereby. Such bonds shall bear interest at a rate not exceeding 7% per annum, payable annually and be payable not exceeding twenty years from issue. Such bonds shall be signed by the chairman of the [fol. 56] board of county commissioners and countersigned by the auditor, who shall keep a record of all such bonds. Such bonds shall be issued for the benefit of the particular drainage, numbered, recorded and indexed in the office of the county auditor, and shall in no case be issued for a sum exceeding the benefits to the land affected by such drainage. The board of county commissioners shall have the power to negotiate such bonds at not less than par value, as it may deem best for the interest of all persons affected by such drainage, any premium received on such bonds to be credited to the fund of the particular drainage. Such bonds shall contain a recital that the same are issued pursuant to the authority of this article and that they are to be paid out of the funds to be obtained as herein provided. Assessments shall be made upon all of the lands benefited by such drainage for the payment of the principal and interest of such bonds when the same shall become due. Such assessments may be made by separate assessments for installments of interest and principal or in one proceeding with

but one set of notices. When the assessments are finally fixed the same shall be certified to the county treasurer by the county auditor, and the money paid in thereon shall be received by the county treasurer and paid over to the holders of such bonds. Separate funds shall be kept by the treasurer for each drainage project, and no funds for one drainage project shall be applied to any other drainage. No county shall be liable for the payment of any bonds issued under this article, but such bonds shall be paid only out of the funds derived from the special assessments herein provided for. Such bonds may be made payable at such times as the board of county commissioners shall find for [fol. 57] the best interests of the persons benefited by the drainage, and may be issued for all or any portion of the expenses of such drainage. (#15, ch. 98, 1905; #15, ch. 134, 1907.)

#8474. Further Powers of Board. Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as in all lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly. (#17, ch. 98, 1905; #17, ch. 134, 1907).

#8475. Ditch or Drain May be Declared Nuisance. Any ditch, drain or watercourse, which is now or may hereafter be constructed so as to prevent the surface and overflow water from adjacent lands from entering the same is hereby declared a nuisance and may be abated as such. (#18, ch. 98, 1905; #18, ch. 134, 1907).

#8476. Powers Defined. The powers conferred by this article for establishing and constructing drains shall also

extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed also to straightening, cleaning out and deepening the channels of creeks and streams and constructing, [fol. 58] maintaining, remodeling and repairing levees, dykes and barriers for the purpose of drainage; and the board of county commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, but no proceedings affecting the rights of persons or property shall be had under this section except upon notice and the other procedure prescribed herein for the construction of drains. (#19, ch. 98, 1905; #19, ch. 134, 1907).

#8477. Drains Under Charge of County Commissioners. All drains that have been constructed under any law of this state, or that may be constructed under the provisions of this article, shall except as otherwise specifically provided, be under the charge of the board of county commissioners and be by it kept open and in repair. In all cases when any completed drain is or may be situated in more than one county, the care of the portion thereof lying within any county is assigned to the board of county commissioners of such county to be kept open and in repair. The cost of such repairs shall in all cases be assessed, levied and collected in the same manner as provided in this article for the construction of drains originally and in all cases when no assessments of benefits shall have been made, the board of county commissioners having charge of such drain shall make such assessments. (#20, ch. 98, 1905; #20, ch. 134, 1907).

#8478. Board May Make Rules and Regulations. The board of county commissioners may make such rules and regulations on the subject of drainage as it may deem proper, not inconsistent with the provisions of this article, and especially with regard to clearing out and keeping clear [fol. 59] the channels of streams and the construction and maintenance of dams thereupon, with reference to their capacity for drainage. (#21, ch. 98, 1905; #21, ch. 134, 1907).

#8482. Drains for Towns and Cities. The board of county commissioners shall have authority to establish

drainage for or including the whole or any part of any city or incorporated town, including cities acting under special charter, as provided in this article, and it shall have the same authority with respect to the assessment of damages and benefits within such city or town as in other cases provided for in this article, and like notices to such city or town with respect to the establishment of such drainage and the apportionment and assessment of damages and benefits shall be given as is required by this article to be given to the owner of property damaged or benefited by the establishment or construction of such improvement. #24, ch. 98, 1905; #24, ch. 134, 1907.)

#8485. Compensation of County Commissioners. The county commissioners shall receive for their services four dollars per day for the time actually spent by them in the performance of the duties of their offices under this chapter, publishers of newspapers shall receive for publishing legal notices the same fees as are allowed by law for publishing proceedings of the county commissioners; but the proceedings of the board of county commissioners when acting in any drainage matter under this article shall not be published as a part of its regular proceedings or at all. The county auditor shall charge a reasonable amount, to be fixed by the board, for services, to be paid [fol. 60] into the general fund of the county. Each county commissioner shall have power to administer any oath required in any drainage proceeding. (#27, ch. 98, 1905; #27, ch. 134, 1907; #11, ch. 102, 1909.)

#8486. Notices, How Served. Notice by personal service, as of a summons in a civil action, may be given instead of by publication and posting in all cases where notice is provided for in this article. In any case where notice is required under the provisions of this article and any person affected by the drainage has not been notified, either by publication or personally, and a hearing has been had or determination made, such person may be notified personally or by publication and posting, to show cause at a time and place to be fixed by the board of county commissioners, and to make return or claim damages as in case of the original hearing. Any such omitted person may be brought in on such due notice at any stage of the proceeding, or

after it has been otherwise concluded. The enforcement of any assessment shall not be enjoined for want of the notice provided for in this article, except pending an application to the board of county commissioners for the determination of such matters as to which any person deems himself not bound because of want of notice. (#28, ch. 134, 1907).

#8488. Defects in Proceedings Disregarded. Any defect or irregularity not affecting the substantial rights of parties interested, occurring in any drainage proceeding, shall be disregarded in any action seeking to avoid an assessment or cancel, annul or declare void any such proceeding. And in case the defect is substantial the court shall of its own [fol. 61] motion determine the rights of the parties, validate the proceedings and assess the costs as justice may require, if the court shall find cause for such validation or such action should have been taken in the first instance and all parties interested are before the court. (#29, ch. 98, 1905; #30, ch. 134, 1907.)

#8489. Invalid or Abandoned Proceedings. If any proceedings for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding to be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at

any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the [fol. 62] board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (#33, ch. 134, 1907.)

Exhibit B to Bill of Complaint

Proposed Distribution of Proportional Benefits

District or division	Acres	Units	Per cent of total	
1. Farm lands north of City Limits and North of South Line of Sec. 12-101-50	13,271.09	10,862.30	33.4%	$103,191.85
2. City Lots and Town of Renner lying north of above line	81.20	42.52	0.1%	403.94
3. Farm land and tracts south of above line	2,065.23	2,958.45	9.1%	28,105.28
4. City lots south of above line	361.60	1,372.52	4.2%	13,038.94
5. City of Sioux Falls	.....	3,147.95	7.7%	29,905.52
6. Minnehaha County	.....	2,518.36	7.7%	23,924.42
7. Township roads	.....	1,573.98	4.8%	14,952.81
8. Railroads	.....	4,721.91	14.5%	44,858.15
9. Northern States Power Company	.....	5,351.63	16.5%	50,840.49
Totals	15,722.12	32,549.62	100.0%	$309,221.40

[fol. 63] In the above calculation the Value of One Unit is taken at $9.50.

"Exhibit C" to Bill of Complainant

Drainage Notice

To whom it may concern:

Notice is hereby given that Monday, the 1st day of August, 1921, at 2 o'clock p. m., at the office of the County Auditor of Minnehaha County, South Dakota, at the Court House in the city of Sioux Falls, in said county, has been fixed by the Board of County Commissioners of said county as the time and place for equalizing the proportion of benefits to the several lands, tracts, lots roads, streets, railroad rights-of-way, city water supply and waterworks, city parks and water rights, hydro electric plant, property rights, and interests, embraced within the district of drainage Ditch No. 1 and 2, and benefitted by the construction of said drainage ditch, and that the route and width of said Drainage Ditch No. 1 and 2 shall be as now constructed, and is described as follows:

[fol. 64] Section One

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of Section twenty-nine (29), Township one hundred and two (102), Range forty-nine (49) West of the 5th P. M., running thence South parallel to the adjacent highway two thousand and eighty-five (2085) feet to station one hundred and fourteen (114); also commencing at a point six hundred and seventy-four (674) feet North and about thirty-five (35) degrees West of said Station number one hundred and fourteen (114), thence Southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence South and parallel to said highway seventy-seven hundred (7,700) feet to station number thirty-seven (37), thence South forty-five (45) degrees, East three thousand seven hundred (3,700) feet to station number zero (0), the same being on high water line, thence South fifty-nine (59) degrees and thirty-six (36) minutes, East four hundred and fifty (450) feet, thence South thirty-one (31) degrees, East to the Big Sioux River, the said line being the center line of said drainage ditch, and is in-

tended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two

Commencing at a point ten hundred and thirty-five (1035) feet North and fifty-eight (58) feet West of the Southeast corner of section twenty-nine (29), in Township one hundred and two (102), Range forty-nine (49) the same being the commencement point of section 1, hereinbefore described running thence North five hundred and forty-seven (547) feet, thence North twenty-three (23) degrees, West thirty-three hundred and eighteen (3318) feet to a point fifty-eight (58) feet West of the quarter quarter line in the Northeast quarter section twenty-nine (29), in said township, thence North parallel with and fifty-eight (58) feet West of said quarter quarter through Sections twenty-nine (29), twenty (20), seventeen (17), and a part of Section eight (8), twelve thousand nine hundred and thirty-five (12,935) feet, thence North fifty (50) degrees, East, twenty-seven hundred and thirty-two (2,732) feet to a point thirty-three (33) feet West of the West line of the right-of-way of the Chicago, Milwaukee & St. Paul Ry. Co., in the Northwest quarter of Section nine (9) in said Township, thence Northerly parallel with and thirty-three (33) feet West of said right-of-way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with the high water channel of the Big Sioux River in the Southeast quarter of Section twenty (20) in Township one hundred and three (103) North, of Range forty-nine (49) West.

Section Three

Commencing at a point sixteen hundred and forty (1,640) feet East of the center of Section eighteen (18) in Township one hundred and three (103), Range forty-nine (49); running thence North thirty-three (33) degrees West thirty-one hundred fifty-five (3,155) feet to a point sixty (60) feet West of the quarter corner between Sections seven (7) and eight (8) in said Township; thence North parallel with and sixty (60) feet West of the quarter line in Sections seven (7) and six (6) in said Township and in Section thirty-one (31) in Township one hundred and four (104), North of

Range forty-nine (49) to the center line running East and West through said Section thirty-one (31); thence Northeasterly to the creek near the Northeast corner of said Section thirty-one (31), the said line being the center line of said drainage ditch as now established and constructed.

That in addition thereto the Big Sioux River has been straightened and the channel changes made as follows: Channel changes on Sections five (5) and seven (7), Township one hundred and one (101), Range forty-nine (49); Channel changes on Sections thirty-two (32), twenty-nine (29), twenty (20), eighteen (18), seventeen (17), eight (8) and five (5), Township one hundred and two (102), Range forty-nine (49); and Channel changes on Sections thirty-two (32) and twenty-nine (29), Township one hundred and three (103), Range forty-nine (49); the same being in accordance with the lines of said Drainage Ditch as actually constructed and for which the said Board of County Commissioners heretofore assessed condemnation damages; that maps and profiles of said Drainage Ditch are now on file in the office of the County Auditor of said County, to which reference is hereby made.

That there have been included within the drainage area of Drainage Ditch 1 and 2 the entire drainage area of Drainage Ditches No. 1 and No. 2 heretofore established and constructed, and additional territory contiguous thereto which is benefited by the establishment and construction of said Drainage Ditch No. 1 and 2, and that in the judgment of said Board of County Commissioners all of said territory is interdependent, and is considered as one drainage system; that in the determination of the proportion of benefits fixed upon the lands and premises embraced within said drainage area, the amounts of the assessments heretofore made in the matter of Drainage Ditch No. 1 and Drainage Ditch No. 2 have been taken into consideration.

[fol. 65] That in the consideration and assessment of benefits as hereinafter set forth, the Board of County Commissioners have assumed that the one acre of land in square form lying adjacent to and East and South of the Northwest corner of the Northeast quarter (NE ¼) of the Northwest quarter (NW ¼) of the Northeast Quarter (NE ¼) of Section twenty-nine (29), Township one hundred two (102) North, of Range forty-nine (49) West of the 5th

P. M., the North line of said acre of land being on the North line of said Section twenty-nine (29), and the West line of said acre of land being on the North and South quarter line of the Northwest Quarter (NW ¼) of the Northeast Quarter (NE ¼) of the said Section twenty-nine (29), owned by Charles E. Kaufmann, is benefitted "one," and taking said acre of land as a unit, the proportion of benefits to each tract of property, land, lots, bridges, roads, streets, railroad rights-of-ways, grades and bridges, city water supply and waterworks and city parks, hydro-electric plants and water rights, townships, City of Sioux Falls and County of Minnehaha, and the description of the tracts of property affected by said drainage, and the names of the owners thereof, as they appear from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, on the date of the filing of the petition herein, was fixed as follows:

The following described land lie in Dell Rapids Township, being Township 104 North, Range 49 West:

Name of owner	Description	Sec.	Acres	Proportion of benefit
Ingebor Olsen,	NW ¼ of SE ¼	29	3.00	1.50
Caroline Thompson and E. F. Thompson,	NE ¼ of SW ¼	29	12.80	6.40
Lars Simonson,	SW ¼ of SW ¼	29	23.00	11.50
C. R. Mattern,	SE ¼ of SW ¼	29	39.75	19.80
J. M. Bruaas,	(except right-of-way of C., M. & St. P. Ry.) S ½ of SE ¼	29	41.00	20.50
J. M. Bruaas,	(except right-of-way of C., M. & St. P. Ry.) N. ½ of NE ¼.	32	43.50	14.80
Mali P. Langness,	(except right-of-way of C., M. & St. P. Ry.) S ½ of NE ¼	32	37.00	13.35
Mali P. Langness,	E ½ of NW ¼	32	58.50	30.30
Lars Simonson,	W ½ of NW ¼	32	70.00	59.90
Mali P. Langness,	N ½ of SW ¼	32	72.00	47.40
Randi A. Florin,	SW ¼ of SW ¼	32	38.00	30.40
Mrs. M. O. Nyhus,	SE ¼ of SW ¼	32	35.00	21.00
Mali P. Langness,	(except right-of-way) the unplatted portion of N ½ of SE ¼	32	31.80	11.30

Name of owner	Description	Sec.	Acres	Proportion of benefit
A. J. Pettingill,	the west 500 feet of tract 9 of the SE ¼	32	2.90	1.20
A. J. Pettingill,	(except a part of St. Olaf's Mill tract as shown in book 5, page 63,) tract 3 of SE ¼	32	3.50	1.40
William J. Milne,	St. Olaf's Mill tract as shown in book 5, of deeds, page 63	32	4.30	1.72
[fol. 66] Columbia Creamery Company,	tract as described in book 59 of deeds, page 70, of SE ¼ of SW ¼	32	0.11	0.10
Lars Simonson,	E ½ of NE ¼	31	47.00	42.30
Hans Nelson,	SW ¼ of NE ¼	31	24.00	21.60
Lars Simonson,	SE ¼ of NW ¼	31	4.00	3.60
P. G. Thompson,	NE ¼ of SW ¼	31	30.50	27.45
Julie L. Moe and Julie L. Hustoft,	NW ¼ of SE ¼	31	40.00	36.00
Ole L. Mule,	S ½ of SW ¼	31	38.00	36.10
P. M. Thompson,	NE ¼ of SE ¼	31	39.00	35.10
P. G. Thompson,	W ½ of SW ¼	31	19.50	18.50
Oluf N. Lyng,	E ½ of SW ¼ of SE ¼ and SE ¼ of SE ¼	31	57.50	54.60

The following described lands in Sverdrup Township, being Township 103 North, Range 49 west:

Name of owner	Description	Sec.	Acres	Proportion of benefit
Ole O. Langness,	(except right-of-way of C. M. & St. P. Ry. Co.) NE ¼ of NW ¼	5	8.60	7.70
Baltic Creamery Company,	tract of land 10½ rods east and west by 15 rods north and south, in the NE corner of the NW ¼ of NW ¼	5	0.85	0.90
Oluf N. Lyng,	NW ¼ of NW ¼ (except above tract)	5	32.80	28.80
Gunerius Thompson,	SW ¼ of NW ¼	5	33.00	24.00
Halvor Gunderson,	(except right-of-way of C. M. & St. P. Ry. Co.) SE ¼ of NW ¼	5	9.50	7.10

Name of owner	Description	Sec.	Acres	Proportion of benefit
Gunerius Thompson,	tract 7 of SW ¼	5	25.50	17.85
John Langness,	tract 1 of SW ¼	5	8.00	3.20
A. J. Florin,	tract 2 of SW ¼	5	3.90	1.60
Gunerius Thompson,	tract 3 of SW ¼	5	1.60	0.60
Gunerius Thompson,	tract 4 of SW ¼	5	1.00	0.70
Gunerius Thompson,	tract 5 of SW ¼	5	34.40	13.80
Gunerius Thompson,	tract 6 of SW ¼	5	31.00	21.70
Lena C. Langness,	(except right-of-way of C. M. & St. P. Ry. Co.) NE ¼ of SW ¼	5	27.00	10.80
J. O. Langness,	(except right-of-way of C. M. & St. P. Ry. Co. and the north 3 acres), SW ¼ of SE ¼	5	3.00	2.40
Mary Lee, Libbie Lang, Carrie Lee, Etta M. Lee, Tilda Lee, Mabel O. Lee, and Thomas E. Lee,	NE ¼ of NE ¼ and S ½ of NE ¼	6	112.81	101.50
John Williamson,	NW ¼ of NE ¼	6	38.87	38.80
Even O. Fossum,	NE ¼ of NW ¼	6	31.00	31.00
Lima Hanson,	N ½ of N ½ of SE ¼ of NW ¼	6	5.00	5.00
K. P. Sorklimo,	as described in book 53 of deeds, p. 434, lot 1 of SE ¼ of NW ¼	6	14.70	12.50
Knut Larsen,	W ½ of NW ¼	6	2.00	2.00
Andrew L. Berg,	NW ¼ of SW ¼	6	19.80	19.80
Gunerius Thompson,	NE ¼ of SW ¼, and that part of the SE ¼ of NW ¼ lying south of lot 1	6	48.50	48.50
Andrew L. Berg,	S ½ of SW ¼	6	56.80	56.80
Mary Lee, Libbie Lang, Carrie Lee, Etta M. Lee, Tilda Lee, Mabel O. Lee, and Thomas E. Lee,	N ½ of SE ¼	6	80.00	80.00
Gunerius Thompson,	S ½ of SE ¼	6	80.00	80.00
Gunerius Thompson,	N ½ of NE ¼	7	79.00	79.00
O. J. Ustrad and H. O. Ustrad,	NE ¼ of NW ¼	7	40.00	40.00

Name of owner	Description	Sec.	Acres	Proportion of benefit
O. J. Ustrad and O. O. Sando,	SE ¼ of NW ¼	7	40.00	40.00
Knut Larsen,	S ½ of NW ¼	7	36.30	36.30
Julia Johnson,	S ½ of NE ¼	7	74.00	65.20
M. Florin,	NE ¼ of SW ¼	7	36.00	34.20
Ole O. Florin,	NW ¼ of SW ¼, and S ½ of SW ¼	7	73.50	62.60
John Thompson,	SW ¼ of SE ¼	7	39.00	39.00
A. A. Aas,	tract 2 of SE ¼	7	13.25	13.25
John Risvold,	tract 1 of SE ¼	7	3.00	1.20
Ingeborg Risvold,	tract 3 of SE ¼	7	12.50	5.00
Peder P. Risvold,	tract 4 of SE ¼	7	4.50	1.80
Julia Johnson,	N ½ of SE ¼	7	72.50	65.20
J. P. Risvold,	north 25 acres of SE ¼ of NE ¼	8	20.00	10.00
P. P. Risvold,	south 15 acres of SE ¼ of NE ¼	8	15.00	7.50
J. P. Risvold,	(except right-of-way of C. M. & St. P. Ry. Co.) SW ¼ of NE ¼	8	35.00	21.00
S. E. Kringen,	(except right-of-way of C. M. & St. Paul Ry Co.) N ½ of NE ¼	8	28.80	17.30
C. M. Christianson, Halvor Gunderson and Marie Langness,	NE ¼ of NW ¼	8	40.00	32.00
Gunerius Thompson,	NW ¼ of NW ¼	8	30.00	27.00
J. O. Langness,	SW ¼ of NW ¼	8	35.00	31.50
Jens Erickson,	SE ¼ of NW ¼ and NE ¼ of SW ¼	8	80.00	64.00
Sara Vollan,	NW ¼ of SW ¼	8	40.00	26.00
A. P. Risvold,	north 30 acres of SW ¼ of SW ¼	8	30.00	12.00
J. P. Risvold,	south 10 acres of SW ¼ of SW ¼	8	10.00	4.00
A. P. Risvold,	N ½ of SE ¼ of SW ¼	8	20.00	16.00
P. P. Risvold,	S ½ of SE ¼ of SW ¼	8	20.00	16.00

Name of owner	Description	Sec.	Acres	Proportion of benefit
P. P. Risvold,	north 11 acres of that part east of the right-of-way of C. M. & St. P. Ry. Co., of NW ¼ of SE ¼	8	11.00	6.60
A. P. Risvold,	(except as above, and except right-of-way of C. M. & St. P. Ry. Co.) W ½ of SE ¼	8	64.00	39.60
P. P. Risvold,	NE ¼ of SE ¼	8	39.00	19.50
Lars Paulson, G. P. Wilson and G. T. Nyhus,	SE ¼ of SE ¼	8	37.00	22.20
Sara Vollan,	SW ¼ of NW ¼ and NW ¼ of SW ¼	9	22.50	11.25
T. H. Nyhus,	SW ¼ of SW ¼	9	30.00	15.00
Peder Risvold,	NE ¼ of NW ¼	16	8.40	4.20
John Johnson,	NW ¼ of NW ¼	16	38.00	19.00
P. A. Risvold,	S ½ of NW ¼	16	57.50	28.70
Gilbert Brende,	SW ¼	16	141.00	70.50
Ole Brende,	SW ¼ of SE ¼	16	3.00	1.50
G. T. Nyhus,	NE ¼ of NE ¼	17	36.00	21.60
Gilbert Brende and Ole Brende,	SE ¼ of NE ¼	17	34.00	20.40
Sara Vollan,	(except right-of-way of C. M. & St. P. Ry. Co.) W ½ of NE ¼	17	69.00	41.40
G. T. Gunderson,	NE ¼ of NW ¼ and S ½ of N W ¼	17	120.00	100.00
Peder P. Risvold,	NW ¼ of NW ¼	17	35.00	31.50
Ole O. Florin,	(except tracts numbers 1 to 18) SW ¼	17	4.50	3.10
G. T. Nyhus,	tract 1 of SW ¼	17	6.00	6.00
Thos. O. Brende, Thorston Brende and Joseph O. Brende,	tract 2 of SW ½	17	1.75	0.55
Ingeberg Gunderson and G. T. Gunderson,	tracts 3 and 4 of SW ¼	17	6.00	1.80
Olaf B. Florin,	tract 5 of SW ¼	17	4.00	1.20
Ingeborg Gunderson and Gilbert Gunderson,	tract 6 SW ¼	17	1.75	0.55
Clara Schneider,	tract 7 of SW ¼	17	2.00	0.60

Name of owner	Description	Sec.	Acres	Proportion of benefit
T. N. Nyhus,	tract 8 of SW ¼	17	3.00	0.90
Sara Vollan,	tract 9 of SW ¼	17	3.00	0.90
E. G. Brende,	tracts 10 and 12 of SW ¼	17	4.75	1.42
Iver Paulson,	tract 11 of SW ¼	17	1.50	0.45
G. T. Gunderson,	tract 13 of SW ¼	17	16.00	4.80
Ingeborg Gunderson and Gilbert Gunderson,	tracts 14, 15 and 16 of SW ¼	17	83.72	83.72
Nidros Norwegian Evangelical Lutheran Congregation,	tract 17 of SW ¼	17	8.25	8.25
Knud Thompson and Jacob Olsen,	tract 18 of SW ¼	17	1.00	0.30
B. Peterson,	(except right-of-way of C. M. & St. P. Ry. Co.) W ½ of SE ¼	17	63.00	50.40
Erik Oyen,	NE ¼ of SE ¼	17	32.00	19.30
[fol. 67] Mall P. Johnson,	SE ¼ of SE ¼	17	34.00	23.80
P. P. Risvold,	tract 1 of NE ¼	18	5.50	2.70
Ole J. Stordahl,	tract 2 of NE ¼	18	1.90	1.90
John O. Aasen,	(except tracts 1 and 2) NE ¼	18	100.50	100.50
Andrew A. Aas,	NE ¼ of NW ¼	18	24.20	24.20
Ingeborg Gunderson,	tract 4 of SE ¼	18	6.50	1.90
O. J. Ustrad,	NE ¼ of SE ¼ (except tract 4)	18	15.50	8.80
Martha R. Roberts,	NE ¼ of NE ¼	20	33.50	23.25
B. G. Flamoe,	(except right-of-way of C. M. & St. P. Ry. Co.) NW ¼ of NE ¼	20	35.00	35.00
Haagen O. Skatvold,	(except right-of-way of C. M. & St. P. Ry. Co.) S ½ of NE ¼	20	66.00	47.40
J. J. Flamoe,	tract as described in book 67 of deeds, p. 106, in NE ¼ of NW ¼	20	10.00	10.00

Name of owner	Description	Sec.	Acres	Proportion of benefit
Frederick Johnson and Jens Johnson and Torbjorn Olson, tract 1 of the NW ¼		20	6.00	1.80
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Reuben V. Thompson, Mabel J. Thompson and Carl M. Thompson, (except above described two tracts), NE ¼ of NW ¼		20	18.00	9.30
John J. Almlie, Jr., NW ¼ of NW ¼		20	6.00	1.80
G. G. Flamoe, SE ¼ of NW ¼		20	19.00	5.70
H. O. Skatvold, NW ¼ of SE ¼		20	20.00	6.00
Peter Paulson, (except right-of-way of C. M. & St. P. Ry. Co., and except tract 1) NE ¼ of SE ¼ and and S ½ of SE ¼		20	88.50	69.25
G. T. Nyhus, tract 1 of SE ¼		20	1.50	0.45
Martha R. Roberts, NE ¼		21	42.50	21.25
Martha R. Roberts, NW ¼		21	155.00	92.70
Peter Paulson, W ½ of SW ¼		21	74.50	67.00
Erick G. Brende, E ½ of SW ¼		21	77.50	65.00
Erick G. Brende, SE ¼		21	105.00	73.00
G. T. Nyhus, (except a 5 acre tract 10 rods wide on east end and no rods wide on west end), NE ¼		28	136.00	91.10
E. G. Brende, a 5 acre tract as above described in NE ¼		28	3.00	1.80
O. S. Thompson, (except right-of-way of C. M. & St. P. Ry. Co.), NW ¼		28	136.50	116.50
O. S. Thompson, (except right-of-way of C. M. & St. P. Ry. Co.), N ½ of SW ¼		28	73.00	69.50
G. T. Nyhus, east 19 acres of NW ¼		28	18.00	16.20
Ole Peterson, (except right-of-way of C. M. & St. P. Ry. Co., and except W 1.75 acres of E ½ of SW ¼ of SW ¼), W ½ of SW ¼, of SW ¼		28	16.00	16.00

Name of owner	Description	Sec.	Acres	Proportion of benefit
O. S. Thompson,	E 18.25 acres of E ½ of SW ¼ of SW ¼	28	18.00	18.00
T. S. Roberts,	SE ¼ of SW ¼	28	39.00	39.00
T. S. Roberts,	SW ¼ of SE ¼	28	39.00	39.00
Nils E. Eggen,	SE ¼ of SE ¼	28	34.00	20.40
G. T. Nyhus,	N 3.50 acres of SE ¼	28	3.50	2.45
Erick O. Eggen,	(except N 3.50 acres), N ½ of SE ¼	28	73.00	51.00
Ole O. Eggen,	NW ¼ of SW ¼, except a tract in the NW corner thereof, 26 rods east and west and 3 rods north and south	27	3.00	1.80
E. O. Eggen and D. D. Russell,	W ½ of SW ¼ of SW ¼	27	8.00	5.60
O. S. Thompson,	(except right-of-way of C. M. & St. P. Ry. Co.), tract 3 of NE ¼	29	86.00	72.40
Joseph C. Thompson,	tract 2 of NE ¼	29	20.20	6.06
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Reuben V. Thompson, Mabel Thompson and Carl Thompson,	tract 1 of NE ¼	29	44.00	13.20
A. C. Thompson, J. O. Thompson, William Henry Thompson, F. R. Thompson, R. V. Thompson, M. J. Thompson, and Carl Melvin Thompson,	tracts 1 and 2 of NW ¼	29	3.00	2.40
O. S. Thompson,	N ½ of SE ¼ and SW ¼ of SE ¼	29	85.00	45.50
Ole Peterson,	SE ¼ of SE ¼	29	36.00	36.00
Andrew J. Aasen,	N ½ of NE ¼ and SW ¼ of NE ¼	32	104.00	62.70
Bertha Peterson, Alice C. Thompson, John O. Thompson, William Thompson, Fred R. Thompson, Mabel Thompson, and Carl Thompson,	N ½ of SE ¼ of NE ¼	32	20.00	20.00

Name of owner	Description	Sec.	Acres	Proportion of benefit
Joseph C. Thompson,	S ½ of SE ¼ of NE ¼	32	20.00	20.00
Andrew J. Aasen,	E ½ of NW ¼	32	8.50	2.55
Thomas Hendrickson,	E ½ of SW ¼	32	40.00	12.00
Margaret Finnegan,	SE ¼ of SE ¼	32	39.00	39.00
John Finnegan,	SW ¼ of SE ¼	32	33.00	10.00
James L. Finnegan,	N ½ of SE ¼	32	74.00	53.00
Gurrine Petersen,	S ½ of NE¼	33	70.00	42.00
Martha R. Roberts, John H. Roberts and Thomas S. Roberts,	NE ¼ of NE ¼	33	29.00	17.40
Thomas Roberts,	NW ¼ of NE ¼	33	39.00	39.00
Thomas Roberts,	NE ¼ of NW ¼	33	39.00	39.00
A. J. Aasen, (except right-of-way of C. M. & St. P. Ry. Co.),	NW ¼ of NW ¼	32	35.00	35.00
Bertha Peterson, Alice C. Peterson, John O. Thompson, Fred Thompson, Reuben V. Thompson and Carl Thompson, (except right-of-way of C. M. & St. P. Ry. Co.),	SW ¼ of NW ¼	33	35.00	35.00
Gurrine Petersen,	SE ¼ of NW ¼	33	40.00	34.00
Joseph C. Thompson, (except right-of-way of C. M. & St. P. Ry.),	NW ¼ of SW ¼	33	35.00	35.00
Thomas Hendrickson and B. B. Hendrickson, (except right-of-way of C. M. & St. P. Ry. Co.),	SW ¼ of SW ¼	33	34.00	34.00
Anne O. Haugen, Amanda Haugen and Jennie A. Haugen,	E ½ of SW ¼	33	79.00	69.10
Gurrine Petersen,	SE ¼	33	152.00	76.20
Gurrine Petersen,	W ½ of SW ¼	33	5.50	2.20

The following described lands in Mapleton Township, being Township 102 North, Range 49 West:

Name of owner	Description	Sec.	Acres	Proportion of benefit
P. M. Smith,	W ½ of NW ¼	3	38.00	15.20
Julia Anderson, Ginna Anderson, Joseph Anderson and Anna Anderson,	NW ¼ of SW ¼	3	4.50	2.70
John Sittig,	E ½ of NE ¼	4	73.00	29.20
Ole O. Eggen,	W ½ of NE ¼	4	73.00	36.50
Gurrine Petersen,	E ½ of NW ¼	4	78.00	62.20
Ole Aspaas, (except right-of-way of C. M. & St. P. Ry. Co.),	W ½ of NW ¼	4	67.00	60.30
Martin H. Oyen and C. H. Oyen, (except right-of-way of C. M. & St. P. Ry. Co.),	W ½ of SW ¼	4	69.00	69.00
Ole T. Nessen,	NE ¼ of SW ¼	4	40.00	36.00
A. P. Brende,	SE ¼ of SW ¼	4	38.00	34.20
Ole T. Nessen,	SE ¼	4	132.00	79.20
Ole T. Aaspas,	E ½ of NE ¼	5	74.50	62.50
O. O. Gilseth,	NW ¼ of NE ¼ and W ¾ of SW ¼ of NE ¼	5	66.00	44.40
John Brekke,	E ½ of SE ¼ of SW ¼ of NE ¼	5	1.50	0.45
John Brekke,	SE ¼ of NE ¼ of SW ¼ of NE ¼	5	2.00	0.60
O. O. Gilseth,	NE ¼ of NE ¼ of SW ¼ of NE ¼	5	1.50	0.45
O. O. Gilseth, (except right-of-way of C. M. & St. P. Ry. Co.)	NW ¼	5	29.50	29.50
P. J. Marakergaard, (except right-of-way of C. M. & St. P. Ry. Co.),	SW ¼	5	29.00	24.80
E. O. Eveiebak and Olaf Gilseth,	tract 1 of SE ¼	5	9.30	9.30
John Thompson,	tract 2 of SE ¼	5	4.20	3.70
School District Number Two,	tract 3 of SE ¼	5	1.00	0.80
[fol. 68] C. H. Oyen and M. H. Oyen, (except right-of-way of C. M. & St. P. Ry. Co. and except tracts 1, 2 and 3 above),	SE ¼	5	144.30	130.60

Name of owner	Description	Sec.	Acres	Proportion of benefit
Martin H. Oyen,	E ½ of NE ¼, and that part of NW ¼ of NE ¼ east of C. M. & St. P. Ry., except right-of-way of said railway	8	80.00	80.00
J. L. Ingalls,	north 50 rods of that part west of the river of the W ½ of NE ¼	8	6.00	2.40
Ole Gunderson,	that part south and west of the right-of-way of the C. M. & St. P. Ry. Co., of the W ½ of NE ¼, except the north 50 rods of that part west of the river	8	59.00	59.00
Ole Gunderson,	NW ¼	8	74.00	30.60
Iver Nelson,	NW ¼ of SW ¼, except SE ¼ of SE ¼ of NW ¼ of SW ¼	8	11.00	4.40
M. O. Bonrud,	SE ¼ of SE ¼ of NW ¼ of SW ¼	8	2.50	1.00
Jonas Oleson,	SW ¼ of SW ¼	8	33.00	28.20
Ole Gunderson,	E ½ of SW ¼	8	79.00	75.40
Ole Gunderson,	W ½ of SE ¼	8	74.00	74.00
C. H. Renner,	SE ¼ of SE ¼	8	38.00	38.00
School District Number Two,	one acre in square form in the NW corner of NE ¼ of SE ¼	8	1.00	1.00
Nellie A. Walkins,	NE ¼ of SE ¼, except above described one acre tract, and except right-of-way of C. M. & St. P. Ry. Co.	8	34.00	34.00
Andrew P. Brende,	N ½ of NE ¼	9	48.00	43.20
Ole T. Nessan,	NE ¼ of NW ¼	9	30.00	27.00
Andrew P. Brende,	SE ¼ of NW ¼	9	37.00	37.00
Alfred Christianson,	W ½ of NW ¼, east of C. M. & St. P. right-of-way	9	69.00	69.00
M. H. Oyen,	W ½ of NW ¼ west of right-of-way of C. M. & St. P. Ry. Co.	9	3.00	3.00
Alfred Christiansen,	S ½ of NE ¼	9	37.20	18.40

Name of owner	Description	Sec.	Acres	Proportion of benefit
C. H. Renner, W ½ of SW ¼, except right-of-way of C. M. & St. P. Ry. Co. and except the Town of Renner		9	68.00	68.00
Jonas Olsen, E ½ of SW ¼, except Town of Renner		9	74.50	74.50
Jonas Olsen, S ½ of SE ¼		9	17.50	10.50
Christian Christianson, N ½ of SE ¼		9	29.50	17.20
Jonas Olsen, NW ¼ of NE ¼		16	27.00	16.20
Barney Finnegan, SE ¼ of NE ¼		16	12.00	9.60
Barney Finnegan, SW ¼ of NE ¼		16	38.50	30.80
John Bliss, E ½ of NW ¼		16	78.00	74.20
Leonard Renner, (except right-of-way of C. M. & St. P. Ry. Co.), W ½ of NW ¼		16	73.00	73.00
Mary P. Brende, (except right-of-way of C. M. & St. P. Ry. Co.), NW ¼ of SW ¼		16	37.00	33.30
Ole O. Volden, (except right-of-way of C. M. & St. P. Ry. Co.), SW ¼ of SW ¼		16	35.00	31.50
Ole O. Volden and Thomine Volden, SE ¼ of SW ¼		16	36.00	14.40
Michael P. Brende, NE ¼ of SW ¼		16	40.00	36.00
Mary P. Brende, NW ¼ of SE ¼		16	35.00	14.00
S. P. Brende, SW ¼ of SE ¼		16	22.00	8.80
J. P. Brende and Melvin M. Brende, NE ¼ of SE ¼		16	5.00	2.00
F. I. Renner, E ½ of NE ¼		17	76.00	76.00
Gertie R. Petersen, NW ¼ of NE ¼ and N ½ of SW ¼ of NE ¼		17	54.00	54.00
Iver R. Petersen, S ½ of SW ¼ of NE ¼		17	18.00	18.00
Gertie R. Petersen, NE ¼ of NW ¼		17	39.00	39.00
Gertie R. Petersen, east 13 acres of the N ½ of SE ¼ of NW ¼		17	13.00	13.00
Iver R. Petersen, east 13 acres of the S ½ of SE ¼ of NW ¼		17	13.00	13.00
Bernt Mekvold, west 26.27 acres of SE ¼ of NW ¼		17	26.67	26.67

Name of owner	Description	Sec.	Acres	Proportion of benefit
Bernt Mekvold,	SW ¼ of NW ¼	17	35.00	18.40
Ingevord Petersen,	NW ¼ of NW ¼	17	38.50	15.40
C. C. Fleischer,	N ½ of SW ¼ and SE ¼ of SW ¼	17	114.00	92.60
Nels I. Nelson,	W ½ of SW ¼ of SW ¼	17	20.00	6.00
T. P. Horton,	E ½ of SW ¼ of SW ¼	17	14.00	4.20
C. J. Orstod,	W ½ of SE ¼	17	73.00	37.00
Jonas Olsen,	E ½ of SE ¼	17	76.50	76.50
Jonas Olsen,	SE ¼ of SE ¼	7	1.50	0.60
Ivor R. Petersen,	NE ¼ of NE ¼	18	3.00	1.20
Bernt Mekvold,	SE ¼ of NE ¼	18	12.00	4.80
C. E. Fleischer,	NE ¼ of SE ¼	18	7.00	3.50
Nels I. Nelson,	SE ¼ of SE ¼	18	12.00	6.00
W. O. Quincy,	E ½ of NE ¼	19	8.50	4.25
W. O. Quincy,	W ½ of NW ¼	20	67.00	34.00
Albert N. Allis,	E ½ of NW ¼	20	79.00	61.00
Albert N. Allis,	W ½ of NE ¼	20	72.00	72.00
Henry J. Schimmel,	NE ¼ of NE ¼	20	38.00	38.00
O. S. Pender,	SE ¼ of NE ¼	20	39.00	39.00
R. J. Huston,	N ½ of SW ¼	20	68.50	59.66
Charles E. Kaufmann,	S ½ of SW ¼	20	63.00	54.80
R. J. Huston,	NW ¼ of SE ¼	20	36.00	36.00
O. S. Pender,	E ½ of SE ¼ and SW ¼ of SE ¼	20	108.00	94.40
Paul H. Brende and Martha Brende,	NW ¼ of SW ¼, except right-of-way of C. M. & St. P. Ry. Co.	21	34.00	27.20
O. S. Pender,	SW ¼ of SW ¼, except right-of-way of C. M. & St. P. Ry. Co.	21	37.00	29.60
Michael P. Brende,	E ½ of SW ¼	21	80.00	64.00
E. Larsen,	NW ¼, except right-of-way of C. M. & St. P. Ry. Co.	21	142.00	92.00
Ole O. Volden and Thomine Volden,	NW ¼ of NE ¼	21	13.50	5.40
Alfred Christiansen,	SW ¼ of NE ¼	21	9.00	5.40
Michael P. Brende,	W ½ of SE ¼	21	29.00	23.20

Name of owner	Description	Sec.	Acres	Proportion of benefit
F. H. Woods,	W ½ of NE ¼	28	6.50	5.20
J. A. Erickson,	NW ¼, except right-of-way of C. M. & St. P. Ry. Co.	28	153.00	122.40
Alfred Christiansen,	SW ¼, except right-of-way of C. M. & St. P. Ry. Co.	28	151.00	135.20
Frank Rogers,	W ½ of SE ¼	28	20.00	16.80
Charles E. Kaufmann,	NE ¼	29	143.50	130.40
Charles E. Kaufmann,	NE ¼ of NW ¼	29	36.00	36.00
Carry Ericson and John A. Ericson,	W ½ of NW ¼	29	29.00	20.60
M. P. Brende and S. P. Brende,	tract 1 of NW ¼	29	28.50	24.30
M. P. Brende and S. P. Brende,	except tract 1, SE ¼ of NW ¼	29	5.50	5.50
M. P. Brende and S. P. Brende,	tract 1 of SW ¼	29	4.20	1.26
Ole O. Eggen,	tract 2 of SW ¼	29	26.80	26.80
Carrie Erickson and John Erickson,	W ½ of SW ¼, except right-of-way of W. & S. F. Ry. Co.	29	23.00	23.00
Ellen Berg and Mary Schodjt,	SE ¼ of SW ¼, except right-of-way of W. & S. F. Ry. Co.	29	32.00	32.00
M. Schodjt and O. P. Schodjt,	SW ¼ of SE ¼	29	33.50	33.50
School District Number 17,	a tract 8 rods north and south by 10 rods east and west, in the SE corner of the NW ¼ of SE ¼	29	0.50	0.50
Mary Schodjt and Ole P. Schodjt,	NW ¼ of SE ¼, except tract above described	29	38.50	38.50
C. E. Kaufmann,	NE ¼, SE ¼	29	33.00	33.00
State of South Dakota,	SE ¼ of SE ¼	29	33.00	9.90
Knut O. Jellum,	SW ¼ of SE ¼	31	10.50	10.50

Name of owner	Description	Sec.	Acres	Proportion of benefit
G. E. Eggen, Gura Eggen, Ole E. Moen, Gurrine E. Moen and Ed E. Moen,	E ½ of NE ¼	31	11 00	11 00
K. O. Jellum,	E ½ of SE ¼	31	76 00	76 00
G. E. Eggen, Gura Eggen, Ole E. Moen, Gurrine E. Moen and Ed E. Moen,	N ½ of NW ¼, and SW ¼ of NW ¼, except right-of-way of W. & S. F. Ry. C-.	32	102 00	102 00
Ezra M. Shotwell,	north 3 acres of S ½ of SE ¼ of NW ¼	32	2 50	2 50
W. H. Lyon,	south 5 acres of north 8 acres of S ½ of SE ¼ of NW ¼	32	4 50	4 50
Thomas Paulson,	south 2 acres of N ½ of S ½ of SE ¼ of NW ¼	32	1 50	1 50
[fol. 69]				
N. E. W. Brakke,	S ½ of S ½ of SE ¼ of NW ¼	32	2 00	2 00
J. H. Whitman,	N ½ of SE ¼ of NW ¼, lying west of river	32	4 00	4 00
State of South Dakota	N ½ of SE ¼ of NW ¼ lying east of river	32	13 00	13 00
K. O. Jellum,	SW ¼	32	128 00	128 00
State of South Dakota,	E ½ of NE ¼	32	64 00	59 00
Mary Schodjt and Ole P. Schodjt	NW ¼ of NE ¼	32	40 00	22 00
Joseph H. Whitman,	SW ¼ of NE ¼, except right-of-way of W. & S. F. Ry. Co.	32	37 50	37 50
J. E. Colton,	NW ¼ of SE ¼, except right-of-way of W. & S. F. Ry. Co.	32	36 00	36 00
Thos. S. Nolen	SW ¼ of SE ¼ except right-of-way of W. & S. F. Ry Co.	32	36 50	36 50
State of South Dakota,	E ½ of SE ¼	32	73 00	73 00
Francis A. Miller,	N ½ except right-of-way of C. M. & St. P. Ry. Co.	33	141 50	133 70
State of South Dakota,	N ½ of SW ¼, except right-of-way of C. M. & St. P. Ry Co	33	70 00	70 00

Name of owner	Description	Sec.	Acres	Proportion of benefit
O. Benson, S ½ of SW ¼, except right-of-way of C. M. & St. P. Ry. Co		33	71.00	71.00
O. Benson, W ½ of SE ¼		33	1.50	1.50

The following described lands in Wayne Township, being Township 100 North, Range 50 west:

Name of owner	Description	Sec.	Acres	Proportion of benefit
Lottie Neister, Frank Neister and Ethel F. Neister, NE ¼, except right-of-way of C. St. P. M. & O. Ry. Co		13	103.80	124.60
Hayward Investment Company, E ½ of SW ¼, except right-of-way of C., St. P. M. & O. Ry. Co		13	26.00	26.00
Louie Liesinger, that part of the SE ¼ south of the right-of-way of the C., St. P. M. & O. Ry. Co		13	63.00	75.60
W. H. Lyon that part of the E ½ of SE ¼ north of and excepting the right-of-way of the C., St. P. M. & O. Ry. Co		13	34.00	41.00
Lottie Neister, Frank Neister and Ethel F. Neister, that part of the W ½ of SE ¼ north of the right-of-way of the C., St. P. M. & O. Ry. Co		13	37.00	44.50
Hayward Investment Company, SE ¼ of NW ¼		13	2.00	2.00
A. M. Larkey, NE ¼ of NE ¼		12	1.00	1.00
Theodore A. Mosholder, SE ¼ of NE ¼		12	7.50	7.50
David R. Howie and J. B. Petersen, NE ¼ of SE ¼		12	2.50	2.50
Louis P. Caldwell, NE ¼ of NE ¼, except a tract beginning at NE corner, thence west 310 feet, thence south 120 feet, thence south				

Name of owner	Description	Sec.	Acres	Proportion of benefit
	70 degrees, east 320 feet, thence north 20 degrees east 52, feet, thence north 180 feet to beginning	24	26.70	32.00
Charlie Gibson,	the tract last above described in the NE corner	24	0.78	1.00
William Gage,	NW ¼ of NE ¼	24	34.50	41.50
C. L. Ferguson,	S ½ of NE ¼	24	35.50	42.50
George Parsons,	N ½ of NE ¼	25	15.00	15.00
Harry A. Chetham,	S ½ of NE ¼	25	20.00	16.00
Harry A. Chetham,	N ½ of SE ¼ and SE ¼ of SE ¼	25	25.00	20.00

The following described lands in Sioux Falls Township, being Township 101 North, Range 49 West.

Name of owner	Description	Sec.	Acres	Proportion of benefit
M. Clennon and Josephine Clennon,	SE ¼ of NE ¼	4	2.00	2.00
Fred Nelson,	W ½ of NE ¼	4	45.00	45.00
Fred Nelson,	SE ¼ of NW ¼	4	40.00	40.00
State of South Dakota,	NE ¼ of NW ¼ and W ½ of NW ¼, except right-of-way of C. M. & St. P. Ry. Co.	4	110.90	110.90
State of South Dakota,	SE ¼, except right-of-way of C. M. & St. P. Ry. Co.	4	85.50	85.00
Mary C. Brace,	W ½ of SE ¼, except tracts 1 and 2	4	47.50	47.50
Mary C. Brace,	NE ¼ of SE ¼, except the NE ¼ thereof	4	2.90	2.90
Hans Ruvold,	E ½ of NE ¼, except right-of-way of Watertown & Sioux Falls Ry. Co.	5	68.60	68.60
O. Benson,	NW ¼ of NE ¼	5	38.70	35.20
Sam Helm,	SW ¼ of NE ¼	5	40.00	40.00
A. C. Jenson,	NE ¼ of NW ¼	5	26.80	21.20
D. A. Scott,	NW ¼ of NW ¼	5	36.80	36.80

Name of owner	Description	Sec.	Acres	Proportion of benefit
F. H. Johnson	SW ¼ of NW ¼	5	32.00	32.00
Hans Ruvold,	SE ¼ of NW ¼	5	40.00	23.20
F. H. Johnson,	NW ¼ of SW ¼	5	34.00	34.00
Hans Ruvold,	NE ¼ of SW ¼	5	40.00	38.80
Mary C. Brace,	S ½ of SW ¼, except blocks 34, 35, 49, 50, and 61 of the North Boulevard addition	5	65.50	65.50
Mary C. Brace,	S ½ of SE ¼, except blocks 4, 6, 9, 13 and 29 of the North Boulevard Addition	5	65.00	65.00
Hans Ruvold,	NW ¼ of SE ¼	5	40.00	40.00
State of South Dakota,	NE ¼ of SE ¼, except right-of-way of Watertown & Sioux Falls Ry. Co.	5	35.00	35.00
D. A. Scott,	N ½ of NE ¼	6	65.80	65.80
F. H. Johnson,	S ½ of NE ¼	6	65.00	65.00
F. H. Johnson,	N ½ of SW¼	6	19.00	19.00
George E. Barkley,	S ½ of SW ¼	6	38.00	38.00
George E. Barkley,	SW ¼ of SE ¼	6	32.00	32.00
A. G. Erskine,	tract 1 of SE ¼	6	19.50	19.50
F. G. Carpenter,	tract of 2 of SE ¼	6	11.50	11.50
F. H. Johnson,	½ of SE ¼	6	75.00	75.00
F. G. Carpenter	E ½ of NE ¼	7	79.00	79.00
H. O. Gates and E. J. Sharon,	E ½ of NE ¼	7	77.00	77.00
H. O. Gates and E. J. Sharon,	E ½ of NW ¼	7	55.00	55.00
A. M. Lackey,	NW ¼ of NW ¼	7	34.00	34.00
F. H. Johnson,	SW ¼ of NW ¼	7	10.00	10.00
R. J. Ford,	NW ¼ of SW ¼	7	36.00	36.00
J. A. Redfield,	SW ¼ of SW ¼, except the SW ¼ thereof	7	26.00	26.00
Peter Weinacht,	SW ¼ of SW ¼ of SW ¼	7	3.00	3.00
H. A. Burtch and Henry Brockhouse, Jr.,	that part in SE ¼ north of block 37, Meredith's Second addition south of the center line of Mulberry street extended and between the center lines of Harvard Street and Williams avenue	7	1.00	0.40

Name of owner	Description	Sec.	Acres	Proportion of benefit
E. J. Sharon and F. L. Blackman,	the unplatted part of SE ¼ except above described tract	7	4.00	1.60
I. E. Kosier,	that part of tract 1 of SW ¼ west of block 59, Meredith's Second addition, and between the center lines of Bailey street and Brookings street extended	7	1.50	0.60
E. J. Sharon and F. L. Blackman,	tract 1 of SW ¼, except the above described tract	7	21.00	8.40
A. Gustafson,	SW ¼ of NE ¼	18	36.00	72.00
A. Gustafson,	SE ¼ of NW ¼	18	40.00	80.00
Sioux Valley Granite Company,	that part of the NW ¼ of the NW ¼ east of the river, except block 89, Sioux Falls Imp. Co. addition	18	3.50	5.60
Sioux Valley Granite Company	that part of the NW ¼ of the NW ¼ west of the river, except tract 1 and block 91, Sioux Falls Imp. Co. addition	18	16.50	19.80
S. Widmark,	tract 1 of NW ¼	18	2.00	3.20
W. H. Lyon,	SW ¼ of NW ¼, except right-of-way of C., St. P. M. & O. Ry. Co	18	31.00	37.20
[fol. 70] W. H. Lyon,	NW ¼ of SW ¼, except right-of-way of C. St. P. M. & O. Ry. Co	18	27.00	25.00
S. A. Gehrig,	NE ¼ of SW ¼, except right-of-way of C. St. P. M. & O. Ry. Co	18	39.00	78.00
German State Bank of Dyerville, Ia.,	SW ¼ of SW ¼, and W ½ of SE ¼ of SE ¼, except right-of-way of C. St. P. M. & O. Ry. Co	18	54.50	96.00
G. J. Morris,	E ½ of SE ¼ of SW ¼ except right-of-way of St. P. M. & O. Ry. Co.	18	18.00	36.00

Name of owner	Description	Sec.	Acres	Proportion of benefit
W. Braley,	that part of SE ¼ of SE ¼ north of right-of-way of C. St. P. M. & O. Ry. Co.	18	1.00	1.21
Clark Coats Estate,	NE ¼ of SW ¼, except right-of-way of C. R. I. & P. Ry. Co	22	8.00	11.20
Clark Coats Estate,	W ½ of SE ¼, except right-of-way of C. R. I. & P. Ry. Co.	22	25.00	35 20
Clark Coats Estate,	W ½, of NE ¼	27	11.00	14.00
Clark Coats Estate,	SE ¼ of NW ¼, except right-of-way of Great Northern Ry. Co.	27	5.00	6.00
Clark Coats Estate,	NE ¼ of SW ¼, except right-of-way of Great Northern Ry. Co.	27	6.00	7.20
S. Ella Chase, Henry Eyer Chase, Clara S. Chase, Annie G. Chase,	N ½ of S ½ of NW ¼ of SW ¼, except right-of-way of Great Northern Ry. Co.	27	0.50	0.60
Clarke G. Coats,	S ½ of S ½ of NW ¼ of SW ¼, except right-of-way of Great Northern Ry. Co	27	2.50	3.00
Charles Eckert,	S ½ of SW ¼, except right-of-way of Great Northern Ry. Co., and except blocks 1, 2, 3, and 4, Scott's Second Addition, and except blocks 9, 16 and 19, Edgewood Addition	27	32.00	50.40
Harry A. Chetham	NW ¼ of SW ¼	30	19.00	15.20
J. T. Norris,	SW ¼ of SW ¼	30	12.00	9.60
Stella I. Simpson,	W ½ of NW ¼	30	48.00	43.20
R. L. Dennis,	tract 2	31	1.50	0.80
R. L. Dennis,	tract 4	31	19.00	11.40
R. L. Dennis	tract 5	31	22.00	13.20
R. S. Dennis,	tract 6	31	1.50	0.80
R. L. Dennis,	tract 7	31	4.00	2.40
R. L. Dennis,	tract 13	31	11.00	6.60

Name of owner	Description	Sec.	Acres	Proportion of benefit
R. L. Dennis, tract 14		31	21.00	12.60
R. L. Dennis, tract 15		31	5.00	3.00
R. L. Dennis tract 16		31	9.00	5.40
R. S. Dennis, tract 17		31	3.00	1.80
Roger L. Dennis, tract 18		31	2.00	1.20
Roger L. Dennis, tract 19		31	6.00	3.60
Roger L. Dennis, tract 21		31	3.00	2.40
Roger L. Dennis, tract 22		31	1.00	0.80
Roger L. Dennis, tract 25		31	0.50	0.30
John Debok, W ½ of NW ¼		31	25.50	7.50
John Debok, NW ¼ of SW ¼		31	1.00	0.60
George Henderson, S ½ of SW ¼ of SW ¼		32	9.00	7.20
Frank Corey and F. A. Ayers, S ½ of SE ¼ of SW ¼		32	8.00	6.40
Joe Seuber[illegible], N. ½ of SE ¼ of SW ¼		32	1.00	0.80
William Jones, lots 1, 2, 3, and 4, of Hazelville, SE ¼		32	2.10	4.20
Pauline Zetlitz, lots 5, 6, 7 and 8 of Hazelville, SE ¼		32	2.50	5.00
Norman O. Hamline, lot 2 of NE ¼		32	6.00	6.00
Norman O. Hamline, lot 3 of NE ¼		32	2.50	2.50
J. Walkins and C. S. McDonald, lots 27 and 28 of Walkins & McDonald's plat of W ½ of NW ¼		33	16.50	16.50
Charles Eckert, E ½ of NW ¼ except right-of-way of Great Northern Ry. Co.		33	25.50	30.50
Julius Kuh, W ½ NE ¼ north of the river except right-of-way of Great Northern Ry. Co		33	26.00	32.00
G. B. Tuthill, NE ¼ South of the river		33	14.50	15.30
A. W. Tuthill, N ½ of NW ¼		34	22.00	22.40

Unplatted lands situated within the City of Sioux Falls, being in Township 101 North, Range 49 West.

Name of owner	Description	Sec.	Acres	Proportion of benefit
F. G. Carpenter,	N ½ of NE ¼	8	78.00	78.00
F. G. Carpenter,	SW ¼ of NE ¼, and NW ¼ of NW ¼ of SE ¼ of SE ¼, except blocks 5, 8, 12 and 21, Central Park addition	8	57.50	57.50
E. G. Carpenter,	NW ¼, except blocks 33, 40, 48 and 49 of Central Park addition	8	146.50	146.50
C. E. McKinney,	N ½ of SW ¼	8	38.00	38.00
E. B. Northrup,	SW ¼ of SW ¼	8	23.00	46.00
C. E. McKinney,	SE ¼ of SW ¼	8	33.00	66.00
Watertown and Sioux Falls Railway Co.,	that part of tract 3 of NW ¼ lying west of right-of-way of C. M. & St. P. Ry. Co.	9	13.00	13.00
State of South Dakota,	that part of tract 3 of NW ¼ lying east of right-of-way of C. M. & St. P. Ry. Co.	9	3.00	3.00
State of South Dakota,	tract 1 of NW ¼	9	2.80	2.80
Northern States Power Company,	tract 6 of NE ¼	16	2.68	2.68
Northern States Power Company,	tract 7 of NE ¼	16	2.50	2.50
Equitable Realty Company,	lot 1 of the Equitable Realty Co. Sub of the NE ¼ of NW ¼	16	4.50	4.50
Chicago, Milwaukee & St. Paul Ry. Co.	lot 2 of the Equitable Realty Co. Sub of the NE ¼ of NW ¼	16	2.60	2.60
W. F. Hesse,	lot 3 of the Equitable Realty Co. Sub of the NE ¼ of NW ¼	16	15.10	15.10
Northern States Power Company,	lot 4 of the Equitable Realty Co. Sub of the NE ¼ of NW ¼	16	2.06	2.06

Name of owner	Description	Sec.	Acres	Proportion of benefit
Larabee Mills Company,	lot 5 of the Equitable Realty Co. Sub of the NE ¼ of NW ¼	16	4.70	4.70
International Harvester Company,	lot 1 of tract 1 of NW ¼	16	0.74	3.70
Dakota Iron Store Company,	lots 2, 3, 4, 8 and 9 of tract 1 of the NW ¼	16	4.12	19.60
Equitable Realty Company,	lots 5 and 10 of tract 1 of the NW ¼	16	8.53	42.65
Chicago, Milwaukee & St. Paul Ry. Co.,	lots 6 and 7 of tract 1 of the NW ¼	16	3.80	19.00
Larabee Mills Company,	lot "A" of tract 2 of the NW ¼	16	0.28	1.40
Northern States Power Company,	lots "B" and "C" of tract 2 of the NW ¼	16	2.41	14.00
Chicago, Milwaukee & St. Paul Ry. Co.,	tracts 3 and 4 of NW ¼	16	1.78	9.40
Ed. Ellis,	tract 5 of the NW ¼	16	0.44	0.44
Chicago, Milwaukee & St. Paul Ry. Co.,	station grounds, being that part of SE ¼ of NW ¼ south and west of the right-of-way of the C. M. & St. P. Ry. Co.	16	1.48	7.40
Illinois Central Railroad Co.,	Station Grounds in the SE ¼ of NW ¼	16	2.64	13.40
Illinois Central Railroad Co.,	Station Grounds in the NE ¼ of SW ¼	16	4.23	33.38
Chicago Rock Island & Pacific Ry. Co.,	Station Grounds in the NE ¼ of SW ¼	16	1.00	8.00
Chicago Rock Island & Pacific Ry. Co.,	tracts 1 and 2 of SW ¼	16	0.35	2.10
Sioux Falls Gas Company,	tract 3 of SW ¼	16	0.50	3.00
J. M. Freese,	tract 4 of SW ¼	16	0.10	0.60
A. J. Jordan,	tract 5 of SW ¼	16	0.50	1.80
B. W. Harding,	tract 6 of SW ¼	16	0.20	1.20

Name of owner Description	Sec.	Acres	Proportion of benefit
[fol. 71] J. W. Tuthill Lumber Company, tract 7, north 50 feet of tract 9, tracts 12 and 13 of SW ¼	16	5.68	43.40
A. C. Schoeneman, tract 8 of SW ¼	16	2.85	21.10
J. C. Folger, tract 9 of SW ¼	16	1.40	12.40
Leora B. Francis, tract 10 of SW ¼	16	0.27	2.70
Henrietta Levinger, tract 11 of SW ¼	16	0.19	1.90
H. R. Dennis, east 132 feet of tract 14 of SW ¼	16	0.58	5.80
A. Larsen and G. E. Larsen, tract 14, except the above 132 feet	16	0.50	5.00
Northern States Power Company, tracts 15, 16 and 20 of SW ¼	16	1.93	17.88
Chicago, Rock Island & Pacific Railway, lots A and B of tract 17 of the SW ¼	16	0.39	3.90
S. H. Hurst and T. McKinnon, lot "C" of tract 17 of SW ¼	16	0.39	3.90
Tom McKinnon, lot "D" of tract 17 of SW ¼	16	0.47	4.70
S. H. Hurst, lot "E" of tract 17 of SW ¼	16	0.14	1.40
Guy Strahon, tract 21, except the west 30 feet of SW ¼	16	0.37	3.70
A. S. Held and J. Schetzel, west 30 feet of tract 21, of SW ¼	16	0.13	1.30
F. H. Hollister, tract 22 of SW ¼	16	0.25	2.50
Emerson-Brantingham Implement Co., tract 23 of SW ¼	16	0.22	2.20
Mary C. Brace, tract 24 of SW ¼	16	0.40	4.00
F. C. Whitehouse and George W. Egan, tract 25 of SW ¼	16	0.50	5.00
Chicago, Rock Island and Pacific Co., tract 29 of SW ¼	16	0.20	1.20
M. Margulies, tract 10 of SE ¼	16	0.50	3.00
Great Northern Railway Co., tract 11 of SE ¼	16	0.50	3.00
Girton Adams Ice Company, tract 12 of SE ¼	16	0.50	3.00

Name of owner Description	Sec.	Acres	Proportion of benefit
J. H. Drake, tract 1 of SE ¼	16	2.50	15.00
J. H. Donahoe, tracts 13 and 15 of SE ¼	16	0.80	4.80
J. H. Drake, a tract in the SE corner of Sec. 16, 500 feet north and south by 625 feet east and west	16	2.80	16.80
Catherine W. Peck and Porter P. Peck, tracts 1, 2 and 4 of NW ¼	17	105.45	210.90
City of Sioux Falls, tract 3 of NW ¼	17	2.00	4.00
Marie Winkler, tract 1 of SW ¼	17	5.50	6.80
Francis D. Hopkins, tract 2 of SW ¼	17	1.00	1.20
F. G. Carpenter, tract 3 of SW ¼	17	0.50	0.60
Security and Guaranty Company, NE ¼ of NE ¼, except the east half of block 3, Lincoln Park addition	18	32.00	64.00
Porter P. Peck, SE ¼ of NE ¼	18	34.00	68.00
Marcus A. —— —— ¼ of SE ¼, except the right-of-way of C. St. P. M. & O. Ry. Co., and blocks 12, 21, 22, 27 and 28, Englewood addition	18	20.00	40.00
C. C. Bratrud, N ½ of NE ¼	19	20.00	30.00
Dan Donahoe and W. M. Donahoe, E ½ of NW ¼, except West addition	19	22.50	33.80
Ludwig Seubert, SE ¼ of NE ¼ of NW ¼ of NW ¼	19	2.50	3.75
Jean Obert, NE ¼ of NE ¼ of NW ¼ of NW ¼	19	2.30	3.45
E. V. Rowley, W ½ of NE ¼ of NW ¼ of NW ¼	19	4.80	7.20
Dan A. Donahoe, NW ¼ of NW ¼ of NW ¼, and S ½ of NW ¼ of NW ¼, and SW ¼ of NW ¼	19	53.00	72.30
City of Sioux Falls, lot 1 of SW ¼	19	44.60	53.50
W. H. Thomas, George J. Fullerton and Leopold Guertin, lots 2 and 3 of SW ¼	19	5.50	6.60
Thomas Loughran and Louis Bauch, lot 4 of SW ¼	19	5.00	6.00

Name of owner	Description	Sec.	Acres	Proportion of benefit
Mary L. Guertin, N ½ of lots 5 and 6 of SW ¼		19	3.00	3.60
John H. Fernyhough, S ½ of lots 5 and 6 of SW ¼		19	4.00	4.80
Amelia Bauch, W ½ of SW ¼, except lots 1, 2, 3, 4, 5 and 6		19	23.00	30.00
Sioux Falls Gas Company, tract 3 of NE ¼		21	1.00	1.60
E. H. Hyde, tract 2 of NE ¼		21	1.50	2.20
Inez C. Van Eps, tract 1 of NW ¼		22	10.00	16.00
Joe Tosini, tract 2 of NW ¼		22	4.50	7.20
Girton-Adams Ice Company, tract 4 of NW ¼		22	1.20	1.90
Ed Bell, tract 1 of NE ¼		22	0.50	0.80

Platted Lots and Blocks

Berwick's Addition to Sioux Falls, Township 101, Range 49 Section 9

Name of owner	Description	Block	Proportion of benefit
Grant Lines, lots 7, 8, 9, 10, 11 and 12		1	1.60
Security Savings Bank, all of		2	3.20
F. C. Frizzle, lots 1, 2, 11 and 12		3	1.06
E. N. Frizzle, lots 3, 4, 5, 6, 9 and 10		3	1.59
Grant Lines, lots 7 and 8		3	0.53
A. D. Horton, all of		4	3.20
Edwin N. Potter, all of		5	3.20
Security Savings Bank, all of		6	1.72
F. L. Blackman, lots 1, 2, 7, 8, 11 and 12		7	1.59
City of Sioux Falls, lots 3, 4, 5, 6, 9 and 10		7	1.59
F. C. Frizzle, lots 1, 2, 3, 4, 9 and 10		8	1.59
City of Sioux Falls, lots 5, 6 and 12		8	0.80
J. N. Weston, lots 7 and 8		8	0.53
F. E. Payne, lot 11		8	0.26
Mathias Bloomer, lot 7		9	0.26
Security Savings Bank, except lot 7, all of		9	2.92
J. N. Weston, lots 1, 2, 10, 11 and 12		10	1.33
City of Sioux Falls, lots 3, 4, 5, 6, 7, 8 and 9		10	1.86

Name of owner	Description	Block	Proportion of benefit
State of South Dakota, all of		11	1 72
State of South Dakota, all of		12	3 20
State of South Dakota, lots 1, 2, 3, 4, 5 and 6		13	1 60
Edwin N. Potter, lots 7, 8, 9, 10, 11 and 12		13	1 60
State of South Dakota, all of		14	3 20
Security Savings Bank, all of		15	3 20
Grant Lines, lots 7, 8, 9, 10, 11 and 12		16	1 60
W. C. Archer, lots 11 and 12		17	0 53
Sophia Krull, lots 1, 2, 3, 10 and 11		18	1 32
C. L. Norton, lot 12		18	0 26
State of South Dakota, all of		19	3 20
State of South Dakota, all of		20	3 20
State of South Dakota, all of		21	3 20
State of South Dakota, all of		22	0 86
Security Savings Bank, lots 1, 2, 3 and 4		24	1 06
J. C. Boynton, lot 5		24	0 26
L. J. Modde, lot 6		24	0 26
M. W. Potter, lots 7 and 8		24	0 53
Edwin N. Potter, lots 9, 10, 11 and 12		24	1 06
E. B. Mallet, all of		25	2 34
State of South Dakota, all of		27	0 70
State of South Dakota, all of		28	2 34
State of South Dakota, all of		29	2 34
State of South Dakota, lots 6, 7 and 8		30	0 88
City of Sioux Falls, block "A"		A	10 20

Brookings and Edmunds' Addition to Sioux Falls, Section 16, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
W. H. Thomas, lots 10, 11 and 12		31	9 21
Parlin & Orendorf Plow Co., lot 13 and S ½ of lot 14		31	4 60
O. S. Jones Seed Company, N ½ of lot 14 and S ½ of lot 15		31	3 07
R. A. Wyman, N ½ of lot 15		31	1 53
Jewett Bros. & Jewett, lots 16, 17 and 18		31	9 21

[fol. 72] Burlington Subdivision of lots 10 to 13, block 26 of J. L. Phillips' Addition to Sioux Falls, Section 16, Township 101, Range 9

Name of owner	Description	Block	Proportion of benefit
A. H. Stites, lots 1, 2 and 3			5.50
Farley & Denton Company, lot 4			2.15
Brown Drug Company, lots 5, 6 and 7			6.45

Braley's Addition to Sioux Falls, Section 18, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
W. Braley, lots 1 to 4, and 9 to 17, inclusive		2	7.21
W. Braley, all of		3	11.65
W. Braley, lots 1 to 6, and 11 to 20, inclusive		4	9.03
C. R. Lewis, lots 7, 8, 9 and 10		4	2.17
W. Braley, all of block		5	11.78
George F. Boyle, south 88 feet of lot 4		6	0.82
W. Braley, except south 88 feet of lot 4, all of		6	7.78
W. Braley, all of		7	8.60
W. Braley, all of		8	12.70
Lois W. Jellies, lot 1		9	2.62
W. Braley, lots 2, 3, 4, 5 and 6		9	13.17
W. Braley, all of		10	12.18
W. Braley, all of		11	12.18
W. Braley, all of		12	8.12
W. Braley, lots 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 16 to 30, inclusive		13	14.25
Anna Vaughn, lot 5		13	0.55
W. Braley, lots 1 to 5, and 21 to 30, inclusive		14	8.24
Gertrude Grinde, lot 6		14	0.54
W. Braley, lots 28, 29 and 30		15	1.65

Bunker's Addition to Sioux Falls, Section 8, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Hans Ruvald, lots 1 to 7, lot 11, and lots 13 to 20, inclusive		2	3.15
C. C. Caldwell, lot 12		2	0.21

Central Park Addition to Sioux Falls, Section 8, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Charles Dailey,	lots 1 and 2	1	0.40
Hans Ruvald,	lots 3 and 4	1	0.40
J. H. Fernyhough,	lot 5	1	0.20
F. T. Williams,	lot 6	1	0.20
Bessie Haas,	lots 7 and 8	1	0.40
J. H. Fernyhough,	lots 9, 10, 14, 15 and 16	1	1.00
Benjamin F. Barnes,	lots 11, 12 and 13	1	0.60
John P. Shoemaker,	all of	2	3.20
Frances G. Carpenter,	all of	3	3.20
Henry D. Norris,	all of	4	3.20
Diantha A. Hurd,	all of	5	3.20
Diantha A. Hurd,	all of	12	3.20
Henrietta Levinger,	all of	8	3.20
Marietta Blomiley,	all of	13	3.20
Frances G. Carpenter,	all of	14	3.20
Clara L. Hambright,	lots 1, 2, 3, 4, 13, 14, 15 and 16	15	1.60
Abe Davidson and Sippe Davidson,	lots 5, 6, 7 and 8	15	0.80
Michael Marousak,	lots 9, 10, 11 and 12	15	0.80
Frances G. Carpenter,	all of	16	3.20
Frances G. Carpenter,	all of	17	3.20
Anne E. Ploog,	all of	18	3.20
Frances G. Carpenter,	all of	19	3.20
Frances G. Carpenter and G. T. Greeley,	lots 1 to 4, and 9 to 16, inclusive	20	2.40
Nora Connell,	lots 5, 6, 7 and 8	20	0.80
W. R. Timpe and H. L. Schroeder,	lots 1, 2, 3, 14, 15 and 16	21	1.20
F. L. Blackman,	lots 4, 9, 10, 11 and 12	21	1.00
Mattie M. Hanson,	lots 5, 6, 7 and 8	21	0.80
D. J. Carpenter,	lot 13	21	0.20
Mary C. Brace,	all of	30	3.20
F. L. Blackman,	all of	31	3.20
Frances G. Carpenter,	lots 1 to 14, inclusive	32	2.80
Mary Sanders and May B. Sanders,	lots 15 and 16	32	0.40

Name of owner	Description	Block	Proportion of benefit
Earl H. Roster, all of		33	3.20
Frances G. Carpenter, all of		40	3.20
Frances G. Carpenter, all of		48	3.20
George H. Brace, all of		49	3.20

Daniel's Addition to Sioux Falls, Section 22, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Austin L. Smith, all of		8	4.80
Chicago, Milwaukee & St. Paul Railway Co., all of		9	1.92
Kittery Realty Company, all of		10	2.70
Kittery Realty Company, all of		11	1.28
Girton-Adams Ice Co., all of		12	1.60
Girton-Adams Ice Co., all of		13	1.92

Englewood Addition to Sioux Falls, Section 18, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Marcus A. Russel, all of		1	3.84
William Fuller, all of		2	3.84
Marcus A. Russel, all of		3	3.84
Annie A. W. Nock, all of		4	3.84
James B. Adams, all of		12	3.84
Marcus A. Russel, all of		13	3.84
Mark M. Powers, all of		14	3.84
Marcus A. Russel, all of		15	3.84
Marcus A. Russel, all of		16	3.84
Marcus A. Russel, all of		17	3.84
James B. Adams, all of		18	3.84
F. I. Russel, lots 1 and 2		19	0.48
M. T. Botsford, lots 3 and 4		19	0.48
Addie B. Woodworth, lots 5, 6, 7 and 8		19	0.96
Marcus Russel, lots 9, 10 and 11		19	0.76
Sarah Walker, lot 12		19	0.24
Alice Steinback, lot 13		19	0.24
Lillie M. Darrow, lot- 14, 15 and 16		19	0.72

Name of owner	Description	Block	Proportion of benefit
F. L. Blackman, lots 1, 2, 3 and 4		20	0.96
F. I. Russel, lot 5		20	0.24
Marcus Russel, lot 6		20	0.24
F. I. Russel, lots 7 and 8		20	0.48
Marcus Russel, lots 9 to 16 inclusive		20	1.92
F. I. Russel, lot 1		21	0.24
S. D. Kennedy, lots 2, 3, 4, 5 and 6		21	0.96
F. I. Russel, lot 6		21	0.24
M. J. Tinkham, lots 7 and 8		21	0.48
F. I. Russel, lots 9 to 16 inclusive		21	1.92
Marcus Russel, all of		22	3.84
Marcus Russel, all of		27	3.84
Marcus Russel, all of		28	3.84
Marcus Russel, all of		29	3.84
Ed. A. Benson and Chas. E. Anderson, all of		30	3.84
Marcus Russel, all of		31	3.84
Marcus Russel, lots 1, 2, 3 and 4		32	0.96
F. I. Russel, lots 5 and 6		32	0.48
James Martin, lots 7 and 8		32	0.48
E. T. Newhall, lots 9, 10 and 11		—	0.72
[fol. 73] Joe Kirby, lot 12		32	0.24
Markus A. Russel, lots 13, 14, 15 and 16		32	0.96

Lake Side Addition to Sioux Falls, Section 17, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
City of Sioux Falls, all of		1	2.16
J. W. Parker, lot 14		2	0.36
Sophia M. Breckenridge, lot 15		2	0.36
Security and Guaranty Co., lots 16, 17 and 18		2	1.08
Porter P. Peck, all of		5	3.60

Lake View Addition to Sioux Falls, Section 8, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Mary S. Keith, lots 5, 6, 7 and 8		3	0.80

Lincoln Park Addition to Sioux Falls, Section 18, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Porter P. Peck, lot 6		3	0.32

Meredith's First Addition to Sioux Falls, Section 7, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
F. L. Blackman, lots 1, 2, 3, 4, 10, 11 and 12		1	2.31
Emma J. Smith, lots 1, 2, 3, 4, 8, 9, 10, 11 and 12		2	3.07
W. H. Lyon, all of		3	4.00
Herbert C. Everson and Hattie Everson, all of		4	4.00
William Grotewold, lots 11 and 12		5	0.66
Marian Chase, lots 6 and 7		24	0.66
Thos. Scanlon, all of		25	6.40
Thos. Scanlon, lots 1 to 6, inclusive		26	3.20
Thos. Scanlon, all of		32	6.40

Meredith's Second Addition to Sioux Falls, Section 7, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
E. J. Sharon, all of		33	4.00
E. J. Sharon, all of		34	3.00
Horatio A. Burtch, all of		37	2.00
A. G. Erskine, all of		38	3.90
A. G. Erskine, all of		39	4.00
John E. Patheal, lots 1, 2, 3, 4, 7, 8, 9, 10, 11 and 12		40	3.00
F. L. Blackman and E. J. Sharon, all of		45	2.00
F. L. Blackman and E. J. Sharon, lots 11 and 12		47	0.66
F. L. Blackman and E. J. Sharon, all of		46	2.00
F. L. Blackman and E. J. Sharon, all of		58	2.50
Carrie Lundell, lots 11 and 12		60	0.66
I. E. Kosier, all of		59	1.00
Carrie Lundell, all of		74	3.60
E. R. Loucks, lots 1 and 2		75	0.66
I. E. Kosier, lots 7, 8, 9, 10, 11 and 12		75	2.00

Millard Park Addition to Sioux Falls, Section 17, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Porter P. Peck, lots 10, 11 and 12		34	0.78
Porter P. Peck, all of		1	1.76

Morse's Addition to Sioux Falls, Section 21, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Stephen Donahoe, Den Donahoe, Dan Donahoe and Wm. Donahoe, lots 2, 3, 4, 9, 10 and 11		1	4.25

Millspaugh's Addition to Sioux Falls, Section 21, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Girton-Adams Ice Company, lots 1, 2, 3, 4 and 5, 13, 14, 15 and 16		14	6.70
P. O. Stiver, lots 6, 7, 8, 9, 10, 11 and 12		14	5.90
P. O. Stiver, lots 1, 2, 8, 9, 10 and 11		15	5.10
Girton-Adams Ice Company, lots 3, 4, 5, 6, 7, 12, 13, 14 and 15		15	6.40
Chicago, Milwaukee & St. Paul Ry. Co., lots 16 and 17		15	1.70
P. O. Stiver, lots 1, 2 and 3		16	2.00
J. L. Brookings, lots 14		16	0.60
P. O. Stiver, lots 11, 12, 13 and 14		27	3.40
Girton-Adams Ice Company, lots 10, 11 and 12		28	1.75
Chicago, Milwaukee & St. Paul Ry. Co., lots 13, 14 and 15		28	2.50
P. O. Stiver, lots 16, 17 and 18		28	2.50

North Park Addition to Sioux Falls, Section 8, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Hans Ruvald, lots 1, 2, 3 and 4		2	0.80
John Kadinger, lots 9, 10, 11 and 12		2	0.80

Name of owner	Description	Block	Proportion of benefit
Hans Ruvald, lots 13, 14, 15 and 16		2	0.80
Hans Ruvald, all of		3	3.20
Hans Ruvald, all of		4	3.20
Emma J. Nelson, all of		5	3.20
Hans Ruvald, except lot 6, all of		6	3.00
Hans Ruvald, lots 6, 7 and 8		11	0.60
P. P. Simon, lots 1 and 2		12	0.42
Hans Ruvald, lots 3, 4, 5, 6, 7 and 8		12	1.25
John Frederickson, Peter Helland and Hans Ruvald, lot 6		6	0.20

North Boulevard Addition to Sioux Falls, Township 101, Range 49, Section 5

Name of owner	Description	Block	Proportion of benefit
Mary C. Brace, all of		6	1.60
Mary C. Brace, all of		9	1.60
Mary C. Brace, all of		13	1.60
Mary C. Brace, all of		29	1.60
Mary C. Brace, all of		49	1.60
Mary C. Brace, all of		50	1.60
Mary C. Brace, all of		61	1.60
George H. Brace, all of		4	1.60
George H. Brace, all of		34	1.60
Chas. Brigham, John C. Spafford and George H. Brace, all of		35	1.60

North Park 2nd Addition to Sioux Falls, Section 8, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Julia W. Anderson, lots 11 to 16, inclusive		1	1.20
Hans Ruvald, all of		2	3.20
Hans Ruvald, all of		3	5.14
Ira Cox, all of		4	3.20
Hans Ruvald, all of		5	3.20
Hans Ruvald, all of		6	3.20
Tharon S. Swain and Henry E. Shaw, all of		7	3.20
Hans Ruvald, all of		8	3.20

Name of owner	Description	Block	Proportion of benefit
Hans Ruvald, all of		9	3.20
Hans Ruvald, all of		10	3.20
Ira Cox, all of		11	3.20
Hans Ruvald, lots 17 and 18		12	0.40
Julia W. Anderson, except lots 17 and 18, all of		12	4.74
Hans Ruvald, lots 1, 2, 9, 10, 11, 12, 13, 14, 15 and 16		13	2.00
Hans Ruvald, lots 1, 2, 3, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24		15	3.94
G. J. Fullerton, lots 1 and 2		16	0.40
S. Olney, lots 3, 4 and 5		16	0.60
Hans Ruvald, lots 6, 7, 8, 10, 11, 12 and 13		16	1.40
Ed. H. Storey, lot 9		16	0.20
W. H. Ormiston, lot 14		16	0.20
Hans Ruvald, lots 15 and 16		16	0.40
[fol. 74] Hans Ruvald, all of		17	3.20
Hans Ruvald, except lot 7, all of		18	3.00
S. E. White, lot 7		18	0.20
Hans Ruvald, all of		19	3.20
Hans Ruvald, all of		20	3.20
Hans Ruvald, all of		21	3.20
Hans Ruvald, all of		22	3.20
Hans Ruvald, lots 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16		23	2.40
Vigant Ludwig, lot 20		24	0.20

Harrison's Addition to Sioux Falls, Section 18, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
William Jenkins, lots 5, 6, 7 and 8		6	1.72
Cora Sharon, al- of		11	5.12
Williams Jenkins, lots 7, 8 and 9		12	1.29
Oscar C. Potter, lots 5 and 6		14	0.86
Board of Education, lots 1 to 10, inclusive		15	4.26
A. P. Burtch, all of		16	5.12
Porter P. Peck, all of		17	5.12
Porter P. Peck, all of		18	5.12
Oscar C. Potter, all of		19	5.12
Lester D. Sharon, all of		20	5.12
G. H. Grebel, all of		21	5.12
G. H. Grebel, all of		22	5.12

Name of owner	Description	Block	Proportion of benefit
W. L. Oakes, all of		25	5.12
G. H. Grebel, all of		26	5.12
G. H. Grebel, all of		27	5.12
G. H. Grebel, all of		28	5.12
G. H. Grebel, all of		29	5.12
Oscar C. Potter, all of		30	5.12
Porter P. Peck, all of		31	5.12
Porter P. Peck, all of		32	5.12

J. L. Phillips' Sioux Falls (Original) and J. L. Phillips' Addition to Sioux Falls, Section 16, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
V. Anderson and A. Anderson, lots 18		13	3.98
R. R. Plane, lot 10		13	3.98
L. Coplow, lot 11 and S ½ of lot 12		13	5.97
W. I. Thompson, N ½ of lot 12 and S. 17 feet of lot 13		13	2.65
—J. Solari and S. J. Solari, N 33 feet of lot 13 and lot 14		13	5.30
Patrick Shannon, S ½ of lot 15		13	1.99
A. M. Whitman, N ½ of lot 16		13	1.99
George W. Egan, S ½ of lot 16		13	1.99
C. O. Bailey, N ½ of lot 16		13	1.99
Albert Anderson, lot 17		13	3.98
C. Look and W. H. Look, lot 10 and S ½ of lot 11		14	6.21
John Tosini, N ½ of lot 11		14	2.07
William Reynolds, lot 12		14	4.14
John McKeen, lot 13 and S ½ of lot 14		14	6.21
G. H. Perry Estate, lot 15 and N ½ of lot 14		14	6.21
C. S. Lund, lot 16		14	4.14
G. L. Nadel and Wm. Tate, lot 17		14	4.14
Beach Parshal Realty Co., lot 18		14	4.14
Koenig Realty Co., lots 10, 11 and 12		15	12.42
Josephine Levinger, S ½ of lot 13		15	2.07
G. T. Greeley, N ½ of lot 13		15	2.07
E. J. Daniels, lot 14		15	4.14
C. C. Bratrud, lot 15		15	4.14

Name of owner	Description	Block	Proportion of benefit
F. Hyde, S ½ of lot 16		15	2.07
G. T. Greeley, N ½ of lot 16		15	2.07
Inez C. Van Eps, lots 17 and 18		15	8.28
F. S. Emerson Estate, lot 1		21	4.60
C. E. Kaufmann, N ½ of lot 2		21	2.30
G. T. Greeley, S ½ of lot 2		21	2.30
E. L. Smith, lots 3 and 4		21	9.20
E. B. Northrup, lot 5		21	4.60
W. A. Beach, N ½ of lot 6		21	2.30
A. K. Pay, S ½ of lot 6, and lot 7		21	6.90
G. T. Greeley, lot 8		21	4.60
William Carswell, N ½ of lot 9		21	2.30
S. K. Grigsby, S ½ of lot 9		21	2.30
W. Braley and G. T. Blackman, W 100 feet of lots 10 and 11		21	5.52
J. W. Jones, E 50 feet of lots 10 and 11		21	2.75
J. W. Jones, lot 12		21	4.14
L. A. Kelly, lots 13 and 14		21	8.28
E. L. Smith, lot 15 and S ½ of lot 16		21	6.21
H. A. Homan, N ½ of lot 16 and lot 17		21	6.21
— C. Smith, lot 9		22	4.83
C. Kirakedes, lot 1		22	4.83
Inez C. Van Eps, lot 2		22	4.83
Lacotah Building Company, lot 3 and N ½ of lot 4		22	7.24
F. Angel, S ½ of lot 4		22	2.41
Inez C. Van Eps, lot 5		22	4.83
Mary Zempel, lot 6		22	4.83
E. B. Northrup, lot 7		22	4.83
R. F. Pettigrew, lot 8		22	4.83
W. K. Van Brunt, lots 1 and 2, and N ½ of lot 3		23	10.72
Van Brunt-Overland Co., S ½ of lot 3 and N ½ of lot 4		23	4.29
George H. Brace, S ½ of lot 4, and lots 5 and 6		23	10.72
J. M. Weston, lot 7		23	4.29
German Savings Bank, lot 8		23	4.29
Joseph Tosini, N ½ of lot 9		23	2.15
R. L. Look, S ½ of lot 9		23	2.15
George B. Cone, lots 1 and 2		24	8.28
F. M. Mills, lot 3		24	4.14
W. I. Thompson and J. W. Wadden, lot 4		24	4.14

Name of owner	Description	Block	Proportion of benefit
Madison M-ll Co., lot 5		24	4.14
W. I. Thompson, lot 6		24	4.14
Rock Island Plow Co., lot 7 and N ½ of lot 8		24	6.21
Luella A. Jones, lot 9 and S ½ of lot 8		24	6.21
Chicago, Milwaukee & St. Paul Ry. Co., lots 10 to 18, inclusive		24	37.26
Manchaster Biscuit Company, lots 1, 2, 3 and 4		25	17.16
Chicago, Milwaukee & St. Paul Ry. Co., lots 5, 6, 7, 8 and 9		25	21.45
J. P. Edmison and E. L. Smith, lots 4, 5 and 6		26	10.35
Chicago, Rock Island & Pacific Ry. Co., west 44 feet of lots 7, 8 and 9		26	3.64
H. T. Pramley, east 42 feet of west 86 feet of lots 7, 8 and 9		26	3.43
Pete Ellingson and John Ellingson, east 42 feet of west 128 feet of lots 7, 8 and 9		26	3.43
Pete Ellingson, east 22 feet of lots 7, 8 and 9		26	1.82

Sioux Falls Improvement Company's Addition to Sioux Falls, Section 18, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
S. E. Reinius, all of		89	2.50
Sioux Valley Granite Company, lots 1, 2, 3, and 4		91	0.66
Sara Foster, lots 12, 13 and 14		91	0.54
J. Reichard and J. W. Reichard, lots 15 and 16		91	0.36
Moses Hawkins, lot 17		91	0.18
James W. Bowles, lot 18		91	0.18

Silver Park Addition to Sioux Falls, Section 24, Township 101, Range 50

Name of owner	Description	Block	Proportion of benefit
Great Northern Investment Co., blocks 1, 2 3 and 4		..	11.60
[fol. 75] Great Western Investment Co. blocks 13, 14, 15, 16, 17, 18, 19, 20, 29, 30, 31, 32, 33, 34, 35, 47, 48, 49, 50, 63 and 64		..	63.60

Van Eps' Addition to Sioux Falls, Section 22, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Joe Tosini, all of		1	2.00
Joe Tosini, all of		2	5.12
Jose Tosini, lot 1		3	0.43
Inez C. Van Eps, lots 1 to 6, and 9 to 12, inclusive		3	4.27
Inez C. Van Eps, lots 1, 2, 3, 4 and 5	24 2nd Add.		3.00
William Lackey, lot 6	24 2nd Add.		0.70
Inez C. Van Eps, lots 1, 2, 3, 4 and 5	18 2nd Add.		2.50
Inez C. Van Eps, lot 1	27 2nd Add.		0.32
Inez C. Van Eps, lots 1, 2 and 3	19 2nd Add.		1.50
Inez C. Van Eps, lots 5 to 13, inclusive	30 2nd Add.		3.20
Inez C. Van Eps, lots 1, 2 and 3	31 2nd Add.		1.20
Inez C. Van Eps, all of	33 2nd Add.		3.30

West Lawn Addition to Sioux Falls, Section 19, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Dan Donahoe and Wm. Donahoe, blocks 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 20 and 21		..	84.80
Clara L. Hambright all of		13	4.80

West Park Addition to Sioux Falls, Section 17, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
David R. Rector, lots 1 and 2		1	0.72
John P. Hoffman, lot 3		1	0.36
Sioux Falls Trust Company, lots 18, 19 and 20		1	1.08
Sioux Falls Trust Company, lots 1, 2, 3, 19 and 20		2	1.80
Board of Education, lot 18		2	0.36

Glendale Addition to Sioux Falls, Section 33, Township 101, Range 49

Name of owner	Description	Block	Proportion of benefit
Julius Kuh, blocks 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18			41 20

Town of Renner, Section 9, Township 102, Range 49

Name of owner	Description	Block	Proportion of benefit
Leonard Renner, lots 1 to 8, inclusive		1	2 40

Olson's Addition to Renner.

Name of owner	Description	Block	Proportion of benefit
Jonas Olsen, lots 5 to 13, inclusive		1	3 06
H. W. Ross Lumber Co., lots 2, 3 and 4		1	0 72
Jonas Olsen, lots 5 to 13, inclusive		1	3 06
H. W. Ross Lumber Company, lots 14 to 19, inclusive		1	2 34
Jonas Olsen, lots 20 to 24, inclusive		1	1 70

Benefits to Roads, Railroads, Etc.

Chicago, Rock Island & Pacific Railway Co., benefits to right-of-way, tracks, embankments and bridges across sections 16, 21, and 22, township 101, range 49, west of the 5th P. M., within the drainage area	839 45
Chicago, St. Paul, Minneapolis & Omaha Railway Co., benefits to right-of-way, tracks, embankments and bridges across sections 16 and 18, township 101, range 49, west of the 5th P. M., and across section 13, township 101, range 50, west of the 5th P. M., within the drainage area	839 45
Great Northern Railway Co., benefits of right-of-way, tracks embankments and bridges across sections 27, 16 and 31, township 101, range 49, west of the 5th P. M., within the drainage area	613 85

	Proportion of benefit
Watertown & Sioux Falls Railway Co., benefits to right-of-way, tracks, embankments and bridges across sections 4, 5 and 9, Township 101, range 49, west of the 5th P. M., and across sections 29 and 32, township 102, range 49, west of the 5th P. M., within the drainage area	750 26
Chicago, Milwaukee & St. Paul Railway Co., benefits to right-of-way, tracks, embankments and bridges across sections 4, 9, 16, 21 and 22, township 101, range 49, west of the 5th P. M., and across sections 4, 9, 16, 21 and 28 and 33, township 102, range 49, west of the 5th P. M., and across sections 5, 8, 17, 20, 28, 29, and 33, township 104, range 49, west of the 5th P. M., and across section 32, township 104, range 49, west of the 5th P. M., within the drainage area	1,678 90
City of Sioux Falls, benefits to water supply, highways and dedicated streets within the drainage area	3,147 95
Sioux Falls Township, benefits to 3.48 miles of laid out and established highways within the drainage area	171 76
Mapleton Township, benefits to 11.95 miles of laid out and established highways within the drainage area	589 85
Sverdrup Township, benefits to 15.00 miles of laid out and established highways within the drainage area	760 09
Dell Rapids Township, benefits to 1.06 miles of laid out and established highway within the drainage area	52 32
Minnehaha County, benefits to 7 67 miles of laid out and established highways and to bridges within the drainage area	2,518 36
Northern States Power Company, benefits to Hydro Electric plant situated in lot 4, of Equitable Realty Co., sub-division of SE ¼ of NW ¼ of Section 16, Township 101, Range 49 West of the 5th P. M., and in tracts Nos. 6 and 7 of the NE ¼ of Section 16, Township	

101, Range 49 West of the 5th P. M., and benefits to water rights across sections 16, 21, 22, 27, 34, 33, 32, 31, 30, 19, 18, 7, 6, and 5, Township 101, Range 49, West of the 5th P. M., and across Sections 25, and 24, Township 101, Range 50 West of the 5th P. M., and across Sections 32, 29, 20, 17, 18, 8 and 5, Township 102, Range 49 West of the 5th P. M., and across Sections 32, 29, 20 and 17 Township 103, Range 49, West of the 5th P. M..... 5,351 63

All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed as stated, and the said determination of said board made final.

Dated June 10, 1921.

A. G. Risty,
Chairman of the Board of County Commissioners of Minnehaha County, South Dakota.

Attest:

F. E. Ward, County Auditor. (Seal.)

[fol. 76] "Exhibit D" to Bill of Complaint

(Decree, March 2, 1922.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

No. 99. In Equity.

Chicago, Milwaukee & St. Paul Railway Company,
Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O.

Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, and W. G. Porter, Intervening Defendants.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was Ordered, Adjudged, and Decreed as follows, [fol. 77] viz: that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of the County of Minnehaha, and State of South Dakota, their agents, servants, employes, attorneys, and successors in office, and each and every of them, be and they are hereby forever restrained and enjoined from making any apportionment of benefits upon the plaintiff herein, the Chicago, Milwaukee & St. Paul Railway Company, or upon any propery belonging to the plaintiff (other than such property of the plaintiff as may have heretofore been assessed for the original construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2, of Minnehaha County, South Dakota) for the construction of a spillway, dams, retaining gates, ditches, and for all other work done or that may hereafter be done by or under the supervision of the Board of County Commissioners of the County of Minnehaha South Dakota in the matter of the construction, or re-construction, repair, or maintenance of Drainage Ditch No. 1, and Drainage Ditch No. 2, or of said ditches under the designation of "Drainage Ditch No. 1 and No. 2" as "Drainage Ditch No.

1 and 2," of Minnehaha County, South Dakota, and that they and each of them are hereby perpetually restrained and enjoined from making any assessments on said property, or upon any parcel or portion thereof for the cost of the construction, reconstruction, repair or maintenance of the said spillway, dams, retaining gates, ditches and other work heretofore done, or which may be hereafter done upon the said drainage ditches above referred, to, or any of them, and from in any manner including any of the property of the plaintiff, the Chicago, Milwaukee & St. Paul [fol. 78] Railway Company (other than the property originally assessed for the construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2) within the territory benefited by said drainage ditches, or either of them.

It is further ordered, adjudged and decreed that the defendant, Fred E. Ward as Auditor of the said County of Minnehaha, South Dakota, his agents, servants, employees, attorneys and successors in office, and each and every of them, be and are hereby forever restrained and enjoined from making any such apportionment of benefits, or from making, or levying any such assessment upon the plaintiff, the Chicago, Milwaukee and St. Paul Railway Company, or upon any of the property (other than that originally asessed for the construction of said Drainage Ditch No. 1 and said Drainage Ditch No. 2) and from certifying any such assessment to the County Treasurer of the said County of Minnehaha, South Dakota.

It is further ordered, adjudged and decreed that the defendant J. O. Anderson, as Treasurer of the County of Minnehaha, South Dakota, his agents, servants, employees, attorneys, and successors in office, and each and every of them, are hereby forever restrained and enjoined from filing any such assessment and from collecting any such assessment against the property of the plaintiff, the Chicago, Milwaukee & St. Paul Railway Company (other than the property heretofore assessed for the original construction of the said Drainage Ditch No. 1 or of said Drainage Ditch No. 2).

It is further ordered, adjudged and decreed that this [fol. 79] decree be and is hereby declared to be without prejudice to any of the rights of the plaintiff, the Chicago, Milwaukee & St. Paul Railway Company, to object to any apportionment of benefits for the construction of said spill-

way, dams, retaining gates, ditches and other work heretofore done, or that may hereafter be done by the Board of County Commissioners of Minnehaha County, South Dakota, in the matter of the construction, or re-construction, repair, or maintenance of Drainage Ditch No. 1 or of Drainage Ditch No. 2, or of the Drainage Ditches No. 1 and No. 2, or of Drainage Ditch No. 1 and 2 of Minnehaha County, South Dakota, upon any of the property of the plaintiff which may heretofore have been assessed for the original construction of said Drainage Ditch No. 1 or of said Drainage Ditch No. 2, and without prejudice to any and all rights of the plaintiff to contest any such apportionment of benefits, or any assessment which may be made under any such apportionment of benefits, or any act of the Board of County Commissioners of said County of Minnehaha in the construction of said spillway, dams, retaining gates, ditches and other work heretofore done, or which may be hereafter done by or under the supervision of the Board of County Commissioners of said Minnehaha County, South Dakota, in the matter of the construction or re-construction, repair, or maintenance of said Drainage Ditch No. 1, or of said Drainage Ditch No. 2, or of said Drainage Ditches No. 1 and No. 2 or of said Drainage Ditch No. 1 and 2, and, that so far as this decree is concerned, the rights of the plaintiff, the Chicago, Milwaukee [fol. 80] & St. Paul Railway Company with respect to the making of any apportionment of benefits, or the levying of any assessment against any of its property heretofore assessed for the original construction of said Drainage Ditch No. 1, or of said Drainage Ditch No. 2, are expressly saved and reserved and shall remain the same as if this suit had not been instituted or this decree entered herein.

It is further ordered, adjudged and decreed that the plaintiff herein, the Chicago, Milwaukee & St. Paul Railway Company, have and recover against the defendants herein, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. F. Tyler and C. T. Charnock, as County Commismissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, and against the intervening defendants herein, Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South

Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust and Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, its costs and disbursements herein taxed and allowed in the sum [fol. 81] of — Dollars (the amount thereof to be inserted herein by the Clerk of the Court after the costs shall have been taxed by him).

Done in open Court, at Sioux Falls, in said Southern Division of the District of South Dakota, on the 2nd day of March, 1922.

By the Court:

Jas. D. Elliott, Judge.

Attest: Jerry Carleton, Clerk. (Seal of Court.)

[fol. 82] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR INTERLOCUTORY INJUNCTION—Filed June 23, 1927

Now come the above named plaintiffs and move the Court for an interlocutory injunction herein restraining the defendants herein, their deputies, agents, servants, and employees, and each and every of them, from proceeding further in the making of an apportionment of benefits upon the property of the Chicago, Milwaukee & St. Paul Railway Company now held by plaintiffs as a portion of their receivership estate, for the construction of a spillway, dams, retaining gates, ditches, or other work in the assessment area of Drainage Ditch No. 1 and of Drainage Ditch No. 2

of Minnehaha County, South Dakota, and from making any assessment upon the property of the Chicago, Milwaukee & St. Paul Railway Company for the cost of the construction of said spillway, dams, retaining gates, ditches or other work, or any part thereof, and from doing any act looking towards an apportionment of benefits against the property of the Chicago, Milwaukee & St. Paul Railway Company, or against the property held by plantiffs as a [fol. 83] part of their receivership estate, for any work heretofore done in the area of Drainage Ditch No. 1 and Drainage Ditch No. 2 of Minnehaha county, South Dakota, or of Drainage Ditch No- 1 & 2 of said Minnehaha county, and from doing any act tending towards the making of any assessment for the cost of any such work heretofore done in the area of said Drainage Ditch No. 1, said Drainage Ditch No. 2, or said Drainage Ditch No-. 1 & 2, and ejoining and restraining the defendant, Dale E. Howe, as Auditor of the said county of Minnehaha, his deputies and assistants, and his successors in office, from making any apportionment of benefits for work done, as aforesaid in the area of Drainage Ditch No. 1, Drainage Ditch No. 2, or Drainage Ditch No-. 1 & 2, or from making or filing any assessment therefor upon the property of the Chicago, Miiwaukee & St. Paul Railway Company or upon the property held by plaintiffs as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, and from certifying any assessment therefor to the County Treasurer of the said County of Minnehaha; and that the defendants, A. G. Risty, Chris Olson, L. E. Larson, Fletcher Alguire and William Stringham, as County Commissioners of the said County of Minnehaha, and their successors in office, be enjoined and restrained from fixing an apportionment of benefits for the construction of the spillway, dams, retaining gates, ditches or other work upon the property of the Chicago, Milwaukee & St. Paul Railway Company and upon the property held by plaintiffs as receivers of said Chicago, Milwaukee & St. [fol. 84] Paul Railway Company, and be restrained and enjoined from making any assessment against plaintiffs or the property held by them as Receivers of said Chicago, Milwaukee & St. Paul Railway Company in the area of said Drainage Ditch No. 1, Drainage Ditch No. 2, or Drainage Ditch No. 1 & 2 for the cost of said work; that the de-

fendant, Fred A. Mundt, as Treasurer of Minnehaha County, South Dakota, his deputies and assistants, and his successors in office, and each and every of them, be restrained and enjoined from filing any assessment and from collecting any assessment against the property belonging to the Receivership estate of the plaintiffs or to the said Chicago, Milwaukee & St. Paul Railway Company, upon any assessment for the construction of said spillway, dams, retaining gates and ditches; and that the defendants herein, and each of them, their agents, servants, employees, and successors in office, be further restrained and enjoined as prayed in the bill of complaint herein until the final hearing herein or until the further order of this Court.

The plaintiffs further move that a three judge court constituted as required by law be assembled, and that the motion of plaintiffs for an interlocutory injunction herein be heard before said court as provided by law.

Dated, June 23, 1927.

Bailey & Voorhees and Hepperle & Fuller, Solicitors [fol. 85] for Plaintiffs. H. H. Field and O. W. Dynes, of Counsel.

[File endorsement omitted.]

[fol. 86] In United States District Court

[Title omitted]

Notice of Motion for Injunction and Marshal's Returns—Filed July 7, 1927

To William J. Bulow, Governor of the State of South Dakota, and to Buell F. Jones, Attorney General of the State of South Dakota, and to the above named Defendants, A. G. Risty, Chris Olson, L. W. Larson, Fletcher Alguire and William Stringham, as County Commissioners of Minnehaha County, South Dakota, Dale E. Howe, as County Auditor of Minnehaha County, South Dakota, and Fred A. Mundt, as County Treasurer of Minnehaha County, South Dakota:

You and each of you are hereby notified that the motion of the plaintiffs in the above entitled suit for an interlocu-

tory injunction, a copy of which said motion is hereunto annexed and herewith served upon you, will be brought on for hearing at the room used for the holding of the District Court of the United States for the District of South Dakota, Southern Division, in the Government Building in the City of Sioux Falls, in the District of South Dakota, upon the 7th day of July, 1927, at ten o'clock in the forenoon of that [fols. 87-89] day, or as soon thereafter as counsel can be heard, before a court comprised of three judges, of whom one will be a Circuit Judge, and that at said time and place and before said Court the plaintiffs will ask for an injunction as prayed in said motion and in their bill of complaint herein, and will ask that the defendants be restrained from enforcing the purported statute of the State of South Dakota, relating to drainage and drainage ditches.

Dated at Sioux Falls, South Dakota, June 30, 1927.

Bailey & Voorhees, Solicitors for Plaintiff. H. H. Field & O. W. Dynes, Of Counsel.

Motion omitted; printed side page 82 ante.

In United States District Court

[fol. 90] [Title omitted]

Marshal's Supplemental Return of Service on Notice of Hearing, etc.

I hereby certify and return that I served the within and attached Notice of Hearing and Motion for an Interlocutory Injunction on the therein-named defendant William Stringham, as a County Commissioner of Minnehaha County, South Dakota, on the 7th day of July, 1927, by handing to [fol. 91] and leaving true and correct copies thereof with him personally.

C. N. Leedom, United States Marshal, by J. A. Quigg, Deputy.

United States of America,
District of South Dakota, ss:

I hereby certify and return that the within Notice of Hearing and Motion for an Interlocutory Injunction came

into my hands for service on the 30th day of June, 1927, and that I served the same on the therein-named William J. Bulow, Governor of the State of South Dakota and Buell F. Jones, Attorney General of the State of South Dakota, at Pierre, South Dakota, on the 1st day of July, 1927, by handing to and leaving true and correct copies of the said Notice of Hearing and Motion for an Interlocutory Injunction with each of them personally.

C. N. Leedom, United States Marshal, by A. B. Neely, Deputy.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that the within Notice of Hearing and Motion for an Interlocutory Injunction came into my hands for service on the 1st day of July, 1927, and that I served the same on the within-named defendants A. G. Risty, Chris Olson, L. E. Larson and Fletcher Alguire, as County Commissioners of Minnehaha County, South Dakota; Dale E. Howe, as County Auditor of Minnehaha County, South Dakota, and Fred A. Mundt, as County [fols. 92 & 93] Treasurer of Minnehaha County, South Dakota, on the 1st day of July, 1927, at the places and in the manner hereinafter described, to-wit: On Fletcher Alguire, Dale E. Howe and Fred A. Mundt at Sioux Falls, S. D., by handing to and leaving a true and correct copy thereof with each of them personally; on Chris Olson at Dell Rapids, S. D., by handing to and leaving a true and correct copy thereof with him personally; on A. G. Risty at 1½ miles Northwest of Corson, S. D., by handing to and leaving a true and corect copy thereof with him personally; on L. E. Larson at 3 miles east of Colton, S. D., by handing to and leaving a true and correct copy thereof with Tilda Larson, an adult member of the family of said L. E. Larson, at the dwelling house of the said L. E. Larson, he, the said L. E. Larson being not conveniently found.

I further certify and return that after a due and diligent search I am unable to find the within named defendant William Stringham within my district.

C. N. Leedom, United States Marshal, by J. A. Quigg, Deputy.

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

SHOWING IN RESPONSE TO MOTION FOR INTERLOCUTORY INJUNCTION—Filed July 7, 1927

Come now the above named defendants, A. G. Risty, et al., and for their return to plaintiff's Order to Show Cause herein say; that the motion for an interlocutory injunction and writ of prohibition should not be granted by this Court, for the following reasons, to-wit:

A

The above named defendants, A. G. Risty, et al., for their first showing allege and state that the plaintiff's bill does not state facts sufficient to constitute a cause of action against these defendants nor facts sufficient to warrant the issuance of a writ of prohibition against them because the defendant commissioners, as a drainage board, may have lost jurisdiction of the equalization proceedings as alleged in paragraph 25 of plaintiff's bill, for the reason that it does not appear that the jurisdiction of said defendants, [fol. 95] as a drainage board, has been challenged by objection or motion or otherwise, and the said board has overruled such challenge or otherwise expressed its purpose to proceed.

These defendants specifically deny any knowledge of having lost jurisdiction of said proceedings and allege that the facts upon which said alleged loss of jurisdiction is based have not been presented to them and they have not passed upon the said alleged facts.

These defendants further deny any intention of acting beyond or without jurisdiction in said matter.

Wherefore, these defendants pray the judgment of this Court that said bill be dismissed with their costs.

B

The above named defendants, A. G. Risty, et al., for their showing and response to said Order to Show Cause, allege that the said bill does not state any matter of equity en-

titling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against the defendants, in that the plaintiff has a plain, adequate and complete remedy at law, in that under the South Dakota Revised Code of 1919, Section 6662 provides that in case any railroad company shall refuse or neglect to pay its taxes the County Treasurer, in addition to levying upon its rolling stock under Section 6606, the County Treasurer shall institute and maintain an action in Circuit Court against such company to collect the tax, and the railway company may set up by way of answer any defense which it may have [fol. 96] to the collection of said tax. Revised Code Section 6663 makes the aforesaid statute applicable to any special assessment levied against the railway companies (drainage assessments) and said suit, if involving more than Three Thousand Dollars ($3,000.00), may be removed to the United States District Court and tried upon the law side of the Federal Courts. The same statute also makes all taxes against a railway company a personal tax to be enforced only by seizure and sale of its personal property, and the said tax never becomes a lien or cloud upon the title of said railways real property used for railway purposes.

Wherefore, these defendants pray judgment of this Court that said bill be dismissed with costs.

C

Come now the above named defendants and for their further return to the plaintiff's Order to Show Cause herein, say; that the motion for an interlocutory injunction should not be granted by this Court for the following reasons, to-wit:

That on or about the 4th day of November A. D., 1910, the Board of County Commissioners of Minnehaha County, South Dakota, entered an Order in the matter of Drainage Ditch No. 2 after notice and hearing, equalizing and fixing the proportion of benefits against plaintiff, for benefits obtained for its right-of-way in said drainage ditch assessment area and the said Chicago, Milwaukee & St. Paul Railway Company appealed from said Order to the Circuit Court of Minnehaha County, South Dakota and did, thereupon, remove said cause to the United States District Court

of South Dakota, Southern Division, said Court being a [fol. 97] Court of competent jurisdiction and said action being between the same parties as here litigating, upon the same subject matter, namely, the liability of the plaintiff to be assessed for the cost of reconstruction or repair of Drainage Ditch No. 2—or Drainage Ditch No. 1 & 2, and, the basis therefor, and for the same purpose as this suit is being prosecuted, that is, to determine whether or not any assessment should be made against said plaintiff. The said parties did therein enter into, file and present to said Court their signed stipulation wherein they agreed that judgment be entered therein "fixing the equalized proportion of benefits chargeable to the plaintiff for benefits to its said right-of-way in said matter, in the number of units that will, when the final assessment is made in said Drainage Ditch proceedings, produce the sum of Eighty Five Hundred Dollars ($8,500.00), and that the said money assessment so made shall be entered against said railway company in the sum of Eighty Five Hundred Dollars," and pursuant to said stipulation, on January 15, 1912, a judgment was duly and regularly entered therein adjudging that the equalized proportion of benefits made by the Board of County Commissioners of said County on November 4, 1910, be and the same is hereby modified by reducing the number of units assessed against the right-of-way of the Chicago, Milwaukee & St. Paul Railway Company as laid out and across sections (in said assessment area described) from two hundred fifty seven units to a number of units that will, when [fol. 98] the final assessment is made in said Drainage Ditch proceedings, produce the sum of Eight Thousand Five Hundred Dollars ($8,500.00), and further adjudged that the money assessment should be no more and no less than said sum of money.

That the said judgment fixing the amount of plaintiff's said benefit and assessment on Drainage Ditch No. 2, is still in full force and effect.

That thereafter, pursuant to said judgment, the assessment was made against the plaintiff in the sum of Eighty Five Hundred Dollars ($8,500.00), and said sum was, on April 8, 1912, paid by the plaintiff.

That the total cost of Drainage Ditch No. 2, as determined by the said drainage board was Eighty-one Thousand One

Hundred Six & 11/100 Dollars ($706.11) and the Eight-Five Hundred Dollars ($8,500.00) agreed upon and paid by the plaintiff constituted 10.48% of the total cost of said Drainage Ditch No. 2, which fixes the proportion of the total cost of repair on said Drainage Ditch No. 2, which must be borne by the plaintiff and determines the basis of the assessment to be made against the plaintiff.

The defendants further allege that the proportion of benefit and assessment against the plaintiff for benefit to its property resulting from the construction of Drainage Ditch No. 1, was the sum of Seven Hundred Twenty-one & 12/100 Dollars ($721.12) which sum was paid by the plaintiff on January 7, 1910.

[fol. 99] D

Come now the above named defendants and for their further return to the plaintiff's Order to Show Cause herein, say: that the motion for an interlocutory injunction should not be granted by this Court for the following reasons, to-wit:

That on or about the 20th day of July, A. D., 1921, the plaintiff herein filed in the office of the Clerk of the District Court of the United States for the District of South Dakota, at Sioux Falls, South Dakota, its Bill in Equity wherein the said plaintiff was plaintiff, and the above named County Commissioners, County Auditor and County Treasurer, or their predecessors in office were defendants; that in the said former suit (paragraph Fifth) the plaintiff alleged:

"That prior to the year 1916, the Board of County Commissioners of the said County of Minnehaha established within said County a drainage ditch known as 'Drainage Ditches No. 1 and No. 2', which drainage ditches were designed for the purpose of draining upwards of twenty thousand acres of agricultural land situated in Townships 101, 102, 103 and 104, North, of Range 49, West of the Fifth Principal Meridian, in the said County of Minnehaha; that said drainage ditches were established pursuant to and under the provisions of said purported Law known as Chapter 134 of the Session Laws of South Dakota of 1907, [fol. 100] and extended for a distance of several miles through said townships, and were fully completed prior

to the year 1916; that an assessment for the cost of the construction of said drainage ditches No. 1 and No. 2 was prior to the year 1916 made; and that all matters connected with the construction of said ditches and with the assessment of the costs thereof were fully completed prior to the year 1916."

and the plaintiff further alleged in the Twenty-second paragraph of said Bill of Complaint as follows:

"That said purported statute of the State of South Dakota, 'Exhibit A' hereto, is unconstitutional and void, in that the same is in violation of Section 2 of Article VI of the Constitution of the State of South Dakota, and in that the same is in violation of the Fourteenth Amendment of the Constitution of the United States; that said Statute, 'Exhibit A' is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad company and other corporation, and upon the property of municipal and quasi-municipal corporation, and upon platted property in cities and villages. Said purported law, 'Exhibit A' is further unconstitutional and void in that the same provides for an [fol. 101] assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner; that if said apportionment of benefits be made as threatened by the said board of county commissioners of said Minnehaha County, and as is provided in said notice, 'Exhibit C,' the same will constitute the taking of the property of plaintiff and of the other property owner affected by said notice without due process of law; that a cloud will be placed upon the title of the plaintiff to its real property situated within said drainage area (effected) by said notice, 'Exhibit C,' and that there will result a multiplicity of suits and that plaintiff and other property owners (effected) will suffer irreparable injury."

and these defendants, in their answer in the former suit, admitted that establishment and construction of Drainage

Ditch No. 1 in 1907 and the establishment and construction of Drainage Ditch No. 2 covering the same and additional territory as an enlargement project in 1910 and the defendants specifically denied that said drainage law was violative of the Fourteenth Amendment to the Constitution of the United States; that issues were joined therein and presented, tried and determined, and an opinion and findings by the District Court filed therein upon the 23rd day of February A. D., 1922, and thereafter, on the 2nd day of March A. D., 1927, a Decree or Judgment was entered therein, wherein it appears that said judgment was rendered by a Court of competent jurisdiction between the [fol. 102] same parties, upon the same subject matter, and for the same purpose as this suit is being prosecuted, namely, for the purpose of having it adjudged and determined that the same South Dakota Drainage Statute is unconstitutional and void, in that it violates the Fourteenth Amendment to the Constitution of the United States, as the same was particularly alleged and set out in paragraph twenty-two of said Bill in the above described suit, and as the same is set out and alleged in paragraph twenty-sixth of the Bill of Complaint in the above entitled action.

That in the said former action it was conceded and found that both ditches (No. 1 and No. 2) had been lawfully established and the constitutional question here presented was clearly alleged by plaintiff and denied by defendants and squarely presented, and in passing upon the issues there presented the Court necessarily must have and did pass upon the constitutionality of the said South Dakota Drainage Statute, and said Court made findings and held in unequivocal terms that the said Drainage Statute of South Dakota does not violate the Fourteenth Amendment to the Constitution of the United States, and held that the said South Dakota Drainage Law is constitutional; that said determination by the said United States District Court of South Dakota has never been appealed from, reversed or modified in any particular, and the said judgment and determination therein upon such findings of fact and law is now in full force and effect.

These defendants further allege and show that the above described cause was, by these defendants, appealed to the Circuit Court of Appeals and to the Supreme Court of the [fol. 103] United States, but as to the ruling of this Court

upon the constitutionality of the South Dakota Drainage law no assignment of error was made in either of said Courts and consequently the ruling of the District Court was permitted to stand thereon as the final judgment. It was the ruling of the District Court that Drainage Ditch No. 1 and Drainage Ditch No. 2 were lawfully established and that the work done in reconstruction thereon constituted repair work to be paid for by assessment of the property in said Drainage Ditch No. 2 assessment area and upon the apportionment previously made thereon and this was the holding of all three Courts and the same is the established law of the case as to this plaintiff.

By reason of the foregoing, the plaintiff herein is barred and estopped from further alleging and litigating the question of the legality of the establishment of Drainage Ditch No. 1 and Drainage Ditch No. 2 and alleging that the South Dakota Drainage law is violative of the Fourteenth Amendment to the Constitution of the United States and the said plaintiff is now bound by the said former determination and judgment of this Court, that the said Drainage Ditch No. 1 and Drainage Ditch No. 2 were lawfully established and said Drainage Law is constitutional, and precluded from further litigating said question.

E

And for further reasons why the motion of H. E. Byram et al. as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, plaintiffs herein, for an interlocutory injunction should be denied, these defendants show the Court:

[fol. 104]

I

That these defendants admit Paragraph 1 of plaintiff's bill of complaint.

II

That these defendants admit Paragraph 2 of plaintiff's bill of complaint.

III

That these defendants admit Paragraph 3 of plaintiff's bill of complaint.

IV

That these defendants admit Paragraph 4 of plaintiff's bill of complaint.

V

That Chap. 98, Session Laws 1905, Chap. 134, Session Laws 1907, Chap. 102, Session Laws 1909, Chap. 130, Session Laws 1911, Sec. 8458 to and including Sec. 8491, Revised Code of 1919 and amendments thereto, including Chap. 46, Session Laws 1920, constitute the drainage law of the state of South Dakota.

VI

That these defendants admit the establishment of Drainage Ditch 1 and Drainage Ditch 2 mentioned in Paragraph 6 of plaintiff's bill of complaint, and in relation thereto allege: That on or about July 1, 1907, one William H. Lyon filed with the then Board of County Commissioners his petition in writing, among other things alleging

[fol. 105] "That it is necessary for the drainage of agricultural lands in said Big Sioux Valley between the dam of the Cascade Milling Co. (the Eighth Street bridge) in the city of Sioux Falls and the city of Dell Rapids that the proposed drainage be established,"

and among other things prayed for the establishment and construction of a ditch with its initial point near the place where the Big Sioux River crosses the center line of Sec. 5, Twp. 101, Range 49, running thence southeasterly to a terminal point on said river in Sioux Falls near the center line of Sec. 9, said township and range, being in all about three miles in length; that thereafter such proceedings were had thereon pursuant to law that the then Board established said ditch with a bottom width of approximately 40 feet and designated the same as Drainage Ditch No. 1. That an apportionment of benefits was made and equalized, pursuant to notice duly given, among the lands and properties affected, and assessments as provided by law were made, and said drainage ditch was completed, accepted and paid for by assessments upon the property benefited thereby, at a cost of approximately $46,000, which proportionate as-

sessment as to this plaintiff was paid by the plaintiff railway company herein. That before the completion of said Ditch No. 1, Iver R. Peterson and others filed with the Board a petition and bond praying for the establishment of an enlarged or additional ditch, with its initial point near the place where the Sioux River crosses the south line of Sec. 5 of Mapleton Twp. and its terminal point in the upper end [fol. 106] of said Ditch No. 1, as then established; and that thereafter and on Jan. 8, 1909, A. L. Burg and others filed a petition and bond with the then Board praying that said Board, in acting upon the petition of Iver R. Peterson and others for said enlarged drainage ditch, cause- the same to be extended about twelve miles farther north, and that all of said ditch be made a part of an enlargement of Ditch No. 1, and as a part of said enlarged ditch there be established a ditch on the west side of the Sioux River from a point above the Baltic mill dam southerly to a suitable place on the Sioux River in Sec. 18 in Sverdrup Township, and that a proper outlet be made on the east side of the river for taking care of the surplus waters so dumped into it at said terminal point; and that such proceedings according to the law were had pursuant to said petition and upon notice and hearing that the Board established and thereafter, on May 6, 1909, caused to be constructed and completed an enlarged ditch including all of Drainage Ditch No. 1 district, designated as Drainage Ditch No. 2 of Minnehaha County, South Dakota, with a bottom width of approximately 40 feet, at a cost of approximately $81,000.

That thereafter the Board fixed and apportioned the benefits from said ditches upon the lands and property affected, thereby including all lands and property previously apportioned and assessed for Drainage Ditch No. 1, and including the property set forth in plaintiff's bill of complaint herein; and that this plaintiff Railway Company paid its proportionate share of said benefits so assessed against it.

And these defendants admit, as alleged in said Para- [fol. 107] graph 6 of plaintiff's bill of complaint, that all matters connected with the construction, apportionment and assessment for the costs of said Ditch 1 and Ditch 2 were fully paid for and completed prior to the year 1916.

VII

That these defendants admit Paragraph 7 of plaintiff's bill of complaint.

VIII

That these defendants admit all of Paragraph 8 of plaintiff's bill of complaint except that they allege that the lands on either side of said river channel, as said channel passes through Townships 104, 103, 102 and 101, rise to some height above the normal water level of said river in said channel.

IX

That these defendants admit Paragraph 9 of plaintiff's bill of complaint and further allege that the washing out of the spillway and the channel on March 15, 1916 was caused by a breach made by the river through a natural barrier existing between the river and a short lateral ditch constructed about two and one-half miles north of the southern terminal point of said ditch, thereby permitting the river to flow unobstructed into the short lateral ditch and into the lower end of said drainage ditch.

And the defendants further allege that said Board of County Commissioners of Minnehaha County are by Sec. 20, Chap. 134, Laws 1907, now Sec. 8477, Revised Code of South Dakota, authorized, directed and commanded to keep [fol. 108] drainage ditches in repair and that pursuant thereto the said Board of County Commissioners, by order, placed dams in said ditches so running uncontrolled in order to control the same and to prevent damage to the persons and properties affected and being affected thereby. And that thereupon one Charles Kaufman and others who were like affected, subject to the payment of special assessments and taxes, and who owned land and property in said drainage area, in like manner and in the same class as the plaintiff railway company herein, instituted an action in the Circuit Court of Minnehaha County, South Dakota, being a court of general jurisdiction, in the verified complaint of which it is alleged:

"That the lands and property of each and all of the above named plaintiffs are situated and located in proximity to each other, to the aforesaid drainage ditch (Ditch No. 2)

and to the Sioux River lying north and above a certain branch of the aforesaid drainage ditch, which connects with the said Sioux River in the northeast quarter of Sec. 32 in Mapleton Twp., all of which lands are flat and low-lying and subject to floods unless the surplus waters of the Sioux River are carried off by the aforesaid branch of said drainage ditch, and all of which said lands are now actually drained by said drainage ditch.

"That the defendants above named threaten and are about to construct a dam across said drainage ditch at the point where it connects with the Sioux River in said Sec. 32, of such material and construction as to divert the flow of water in said drainage ditch and prevent the flood waters of the said Sioux River from flowing through said drainage ditch, and said defendants, in furtherance of said threats and intentions, have caused to be transported to said place [fol. 109] large quantities of material to be used in the construction of said dam, and have caused to be employed a large number of men for the purpose of erecting said dam, and have actually commenced the construction of said dam and will, unless restrained by this court, carry said threats and intentions into execution.

"That the construction of said dam as aforesaid and in the place aforementioned will cause great and irreparable injury to the lands of the plaintiffs and many other owners of lands similarly situated and will cause the flood waters of the said Sioux River to back up and flood the lands of plaintiff and others, and to remain on said lands for many weeks, thereby depriving the owners of the use and occupation of the lands and property so flooded, and will at the same time prevent said drainage ditch from being used for the purpose for which it was constructed and is now maintained,"

which said action prayed for an injunction against the defendant Board of County Commissioners of Minnehaha County, South Dakota, from erecting said dam, and that pursuant thereto and the order to show cause issuing out of said court, an order and judgment was entered by said court on March 25, 1916, upon hearing had, as follows:

"It is hereby ordered that said application for a temporary restraining order be and the same is hereby denied,"

whereupon said action was dismissed; which said suit is contained in File No. 15708 of the office of the clerk of the [fol. 110] circuit court within and for Minnehaha County, South Dakota. And that said cause was never appealed and that said order was the final order in said cause, and that said order and judgment is a final, binding and controlling order upon this plaintiff Railway Company in said matters as a member of the same class of taxpapers as the plaintiffs in said action.

X

These defendants admit that if said breach had become permanent, that it would have operated to have relieved lands drained thereby, but allege the fact that, as set forth in the foregoing paragraph, it was the duty of the Board as exhibited by the drainage law of South Dakota and the adjudication aforesaid, to keep in repair said drainage ditch and prevent damage being done thereby.

XI

That immediately after the entry of the order and judgment in the case of Kaufman and others vs. Board of County Commissioners above mentioned, and on or about April 8, 1916, some of the plaintiffs in said last mentioned action and others filed a petition and bond with the Board, praying that the outlet and spillway to said ditches be closed and abandoned, and that a new outlet be provided by diverting the waters thereof at a point approximately one mile north of the outlet thereof to a westerly direction through Covell Lake and thence back into the Sioux River above the city of Sioux Falls; upon which petition the Board caused a survey to be made, report filed and a hearing had, after notice as required by law, at which time many objec- [fol. 111] tions and claims for damages were filed; and upon hearing, on July 8, 1916, the Board allowed the petition and lawfully established said Covell Lake outlet, which order, among other things, provided:

"Resolved, that the repair and maintenance of said Drainage Ditches 1 and 2 and the establishment and construction of said proposed extension to or outlet to Drain-

age Ditch No. 1 will be conducive to the public health, convenience and welfare and it is necessary and practicable for draining agricultural lands, and it is so found.

"Be it further Resolved, that said Drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof at a point on the west bank of Drainage Ditch No. 1 1,610 feet north and 58 feet west of the southeast quarter of Sec. 5, Twp. 101, Range 49, where said ditch swings southeasterly from a southerly direction, and that a new extension to or outlet of said ditch commencing at said point and running thence southeasterly through Covell's lake, etc. be constructed, and that such extension or outlet be and the same is hereby established."

That no further steps were taken under the establishment of the Covell Lake Outlet, and after conferences held between parties affected, a new petition signed by the City of Sioux Falls, F. L. Blackman and others, was filed with the County Auditor on August 3, 1916, which petition, among other things, alleged:

[fol. 112] "That Drainage Ditches Nos. 1 and 2 and the outlet thereto as constructed were and are insufficient to accomplish the purpose for which they were constructed and insufficient to properly drain the agricultural lands within the district or territory supposed to be drained thereby, and insufficient for the drainage of other agricultural lands between the mouth or outlet thereof and the land heretofore included within the assessment districts of Drainage Ditches Nos. 1 and 2; that it is necessary for the drainage of agricultural lands within said drainage districts 1 and 2 and also agricultural lands lying above the mouth of said spillway and between the mouth thereof and the present boundaries of said Drainage Ditches Nos. 1 and 2, to reconstruct, widen and improve said Drainage Ditches Nos. 1 and 2, and to construct a new outlet or spillway thereto, and that in the reconstruction of the same it will be necessary that the same be cleaned, deepened and widened and that certain levees, dikes, flood gates and barriers thereto be constructed, to such an extent as might be necessary to carry off the surplus or flood waters and properly drain and protect the lands within said drainage districts and within the areas hereinafter described; that

to make the foregoing drainage system complete and adequate for the purpose for which it was designed, it will be necessary to widen, clean out and deepen the channel of the Big Sioux River in a number of places within the drainage district. * * * That the lands and territory likely to be affected by the construction of the new spillway and the reconstruction and improvement of said drainage ditches [fol. 113] and which will be drained and benefited and protected thereby, include all the lands lying in the valley of the Big Sioux River, and included within the present boundaries of said drainage districts Nos. 1 and 2, as well as all the lands in the valley of the Big Sioux River between the mouth of said spillway and the city of Dell Rapids that are subject to overflow and will be subject to overflow by the waters of said river if the outlet to said Ditches No. 1 and 2 be abandoned and said outlet closed, and that said drainage districts should be so extended and enlarged as to include all lands and property benefited thereby as far down the valley of the Big Sioux River as the mouth of the outlet or spillway * * *."

which petition was accompanied by bond, approved by the county auditor, was examined by the Board, found sufficient in form, ordered filed, a copy transmitted to the state engineer, who with the Board made an inspection and a survey was then ordered by an assistant state engineer and his preliminary report filed September 30, 1916. On August 14, 1916, said Board fixed the exact line and width of said proposed ditch and the time and place for hearing said petition and gave notice as required by law; which notice, among other things, described the tract of country likely to be affected thereby, included in which description are the properties described in plaintiff's bill of complaint herein, which are affected and benefited thereby, and on October 3, 1916, pursuant to said notice, without any objection, said Board passed a resolution wherein it was ordered, among other things, as follows:

[fol. 114] "Be it Resolved, by the Board * * * that said principal ditch as hereinafter described and set forth, is conducive to the public health, convenience and welfare, and is necessary and practicable for the drainage of agricultural lands, and it is so found.

"Be it Resolved, that said drainage ditch as hereinafter described be and it is hereby named and designated as Drainage Ditch No. 1 and 2.

"Be it Resolved, that said Drainage Ditch No. 1 and 2 be and the same is hereby established in accordance with the resolution adopted by this Board * * *," the center line of which ditch so established being the same as the center line of Ditch No. 1 and Ditch No. 2 and covering the same right of way and territory. And that said ditch was constructed with a bottom width of approximately 90 feet, with dikes on both sides, controlling works installed, and the Sioux River straightened and canalized for about six miles of its course, greatly increasing its carrying capacity.

That the Board, not to prevent the threatened change in the channel, injury to property owners and destruction of the water power and water supply, but pursuant to said petition, and not otherwise, established and constructed Drainage Ditch No. 1 and 2, and that the effect thereof has been to drain the lands and properties within said drainage area, and these defendants deny that said lands and properties have been damaged or the crops grown thereon have been damaged, and that the value of the land has been thereby lessened.

[fol. 115] And these defendants deny each and every other allegation, matter and statement contained in Paragraph 11 of plaintiff's bill of complaint, except as hereinbefore expressly admitted.

XII

These defendants admit that drainage warrants in the sum of $255,000 have been issued by the Board in the construction work and material furnished upon the aforesaid Drainage Ditch No. 1 & 2; but deny that said work was done to control or retard the flow of water or prevent the change in the channel or drainage of the gravel beds, and allege the fact to be that said work was done pursuant to said petition and not otherwise, and deny that the percentages of the total cost was expended as alleged in said Paragraph 12 of plaintiff's bill of complaint.

XIII

These defendants allege that in August, 1916, a petition signed by the City of Sioux Falls, F. L. Blackman and others, was filed with said Board and that pursuant to said petition, upon lawful proceedings had, there was established a drainage known as Drainage Ditch No. 1 & 2, and that the expenditures made by said Board were made pursuant to said petition, and that the establishment of said ditch, the work done and performed thereon, and the expenditures made therefor, by issuance of drainage warrants, have been held lawful and valid by the Supreme Court of the State of South Dakota in the case of State v. Risty et al., reported in 213 N. W. 952; Gilseth v. Risty, reported in 46 S. D. 374; which decisions are hereby referred to and made a part of this return and resistance to said motion. And that these [fol. 116] defendants deny each and every other allegation, matter and statement contained in Paragraph 13 of plaintiff's bill of complaint, except as hereinbefore expressly admitted.

XIV

These defendants admit that prior to the construction of said spillway, dams, retaining gates, ditches and other work, they did not fix the proportion of benefits of said proposed drainage, did not appoint a time and place for equalization of the same, and did not give notice of said equalization; and allege the fact to be that such acts are not by law required by the Board prior to the doing of such construction work, as the drainage statutes have been interpretated by the Supreme Court of the State of South Dakota in the case of Renville State Bank v. Kingsburg, 40 S. D. 191; State v. Risty (S. D.) 213 N. W. 952; and these defendants further admit that they did not make any assessment for the payment of damages caused by the construction of said spillway, dams, retaining gates and ditches, but allege the fact to be that they did pay said damages by the issuance of drainage warrants therefor, and that they are and were, by Sec. 8464 and Sec. 8467, Code 1919, authorized and empowered to pay said damages by the issuance of warrants payable out of assessments to be subsequently made.

XV

These defendants allege that prior to the work done and performed upon said project, plans and specifications were prepared and filed, and that contracts for said work were let upon competitive basis, except as to the construction of [fol. 117] said spillway, which said work was done upon a cost plus basis upon the order of said Board dated June 18, 1917. That upon the entry of said order, one William H. Lyon, an owner of real estate and property within the drainage area of Ditch 1, Ditch 2, and Ditch 1 & 2, affected and benefited thereby, and a person similarly situated and like affected and one obliged to pay the special assessments for the construction of said drainage in like manner as this plaintiff, and in a class with this plaintiff, perfected on appeal from said order to the Circuit Court within and for Minnehaha County, South Dakota, which order provided:

"Ordered, that the Board of County Commissioners cause said spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, purchase the necessary material for such construction, without letting a contract for the entire construction thereof,"

which said appeal came on for hearing before said court on July 14, 1917, and said court, after a full hearing and consideration of the evidence in behalf of the appellant and the Board, entered its order dismissing said appeal and affirming the order of the Board ordering such construction, said court thereby holding that it appears that the "decision appealed from is one that rests in the sound judgment of the Board of County Commissioners and is not a proper subject for review by the court;" which said proceedings of said Board was had under Chap. 206, Session Laws 1917, now Sec. 8465, Code 1919; and that said proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South Dakota, which file and pro- [fol. 118] ceedings are hereby referred to and made a part hereof, and that said decision has never been appealed from and is final and binding upon the plaintiff railway company

herein, who is in a like class of taxpayers with the said plaintiff in said appeal.

That the plaintiff Railway Company herein had due notice and knowledge of said proceedings of the Board in letting said contract and of the work performed and labor furnished thereunder, and took no steps to stop the same, and with such notice and knowledge stood by until an expenditure of approximately $255,000 had been made by said Board, and the said plaintiff has waived its right to now question the validity thereof and is estopped from questioning said proceedings or the validity thereof.

XVI

These defendnats admit Paragraph 16 of plaintiff's bill of complaint.

XVII

That these defendants admit Exhibit C is a copy of the notice of apportionment and equalization of benefits made by the Board and that the same was published July 13 and 20, 1921 in the Sioux Falls daily Argus-Leader, the official newspaper of Minnehaha County, and further allege that the same was posted as required by law, and admit that the total number of units of apportionment of benefit therein set forth is 32,549.62, and that the number of units against the property described in Paragraph 17 of plaintiff's complaint have been apportioned thereto as therein set forth, but deny that the assessment against the property of the Chicago, Milwaukee & St. Paul Railway Company will be as in said paragraph alleged, for the reason [fol. 119] that since the institution of the suit between the parties hereto in the U. S. District Court within and for the District of South Dakota, and on or about July 25, 1921, that said federal courts have held that the work and labor done and performed and material furnished in the enlargement of said Drainage Ditch No-. 1 & 2 is repair work and that said drainage ditch is not an enlarged drainage ditch, and that by reason thereof the assessment upon plaintiff's property must be made in accordance with the drainage law for assessments for repair work.

XVIII

These defendants admit Paragraph 18 of plaintiff's bill of complaint.

XIX

These defendants admit Paragraph 19 of plaintiff's bill of complaint.

XX

These defendants admit Paragraph 20 of plaintiff's bill of complaint and allege the fact to be that the properties therein described are the properties assessed for benefits for Drainage Ditch 1 and Drainage Ditch 2, and that said properties may be assessed for benefits for the work and labor done and materials furnished in what has been held by the federal courts as repair and maintenance of said Ditch 1 and Ditch 2.

XXI

That these defendants admit Paragraph 21 of plaintiff's bill of complaint.

[fol. 120]

XXII

These defendants allege that the right of way of said Railway Company as described in Paragraph 17 of plaintiff's bill of complaint is agricultural land, and admit that plaintiff is a railway corporation and owns a line of railroad in said Minnehaha County, and that its property consists of right of way, station grounds, yards, bridges, culverts, and other property employed in the maintenance and operation of its said Railway, and admit that it is not engaged in agricultural operations, and specifically deny that plaintiff has received no benefit and has suffered damages, and allege the fact to be that the plaintiff herein was given notice by publication and posting as required by law of the establishment and formation of said Drainage Ditch No. 1 & 2, which notice described the route of the proposed drainage, the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the drainage would pass, and the names of the owners thereof as appears from the records of the office of the

Register of Deeds on the date of filing of said petition, and referred to the files in said proceedings for further particulars, the same as all other owners of tracts and property affected in said area were notified and as provided by law.

XXIII

That these defendants admit that this is a suit of a civil nature brought to prevent an assessment against the plaintiff under an act of the Legislature of the State of South Dakota claimed by plaintiff to be in conflict with the due [fol. 121] process of law clause of the Fourteenth Amendment to the Constitution of the United States, and allege the fact to be that the amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000; and denies each and every other allegation, matter and statement contained in said Paragraph 23 of plaintiff's bill of complaint.

XXIV

That under the decisions and holdings of the above named Court, the Circuit Court of Appeals for the Eighth Judicial Circuit and the Supreme Court of the United States, in a case between the parties hereto upon the issues herein, tendered in said courts, that as to this plaintiff Railway Company the construction of the spillway, dams, retaining gates, ditches and other work done and performed upon Drainage Ditch 1 and Drainage Ditch 2, and under the proceedings designated as Drainage Ditch No. 1 & 2, that said work and material constituted repair and maintenance of said old ditches.

That said Drainage Ditch No. 1 was instituted by the petition of W. H. Lyon, which said petition was accompanied by a bond, which was duly approved as provided by law, examined by the Board and found sufficient and ordered filed. And that due and lawful notice, as provided by law, was given of the hearing upon said petition after the width and route of the same had been fixed, and that at said hearing and the time and place appointed therefor, this plaintiff Railway Company appeared, and on December 30, 1907, filed its protests against the establishment of the same, alleging among other grounds that the petition did not state

facts sufficient to authorize any action by the Board; that [fol. 122] it did not set forth facts showing whereby plaintiff Railway Company would be benefited, and that in accordance with the survey filed, the plaintiff Railway Company would in no manner be benefited, and by reason thereof was not a proper party to said proceedings; and that said Board was without jurisdiction over said plaintiff Railway Company; that the notice published and posted for said hearing, a copy of which was made part of said protest, was insufficient and did not set forth facts sufficient to constitute a legal notice as provided by law, in that the same particularly fails to set forth the description of the lands to be crossed and benefited by the construction of said ditch; that no personal notice was given to said plaintiff Railway Company, and that the profile and notes filed by the surveyor failed to show that the ditch was practicable and feasible and that the same was insufficient under the provisions of said drainage law; that the said ditch, as proposed, would not be conducive to the public health, convenience or welfare, nor was it needed nor was it practicable for the drainage of agricultural lands, and that the same was not feasible and would not drain lands sought to be charged with the benefits, and that the same, if constructed, would not carry the water through the ditch and would be a detriment instead of a benefit; and that said law is unconstitutional and in violation of Sec. 13 of Art. 6 of the Constitution of South Dakota. But that said protest was denied, and said plaintiff Railway Company failed to take any appeal therefrom, and that thereafter said drainage ditch was established by the order of the Board of County Commissioners of Minnehaha County, South Dakota, and the work done and performed thereon. That [fol. 123] during the course of the construction of said Drainage Ditch No. 1, petitions were filed to extend and enlarge said Drainage Ditch No. 1, and that such proceedings were had thereon, pursuant to law, that there was thereafter established and constructed what is known as Drainage Ditch No. 2, included in which was the territory covered by Drainage Ditch No. 1.

That an apportionment was made by the Board, and a notice of the apportionment made for the costs of construction of Drainage Ditch No. 1 was posted as required

by law and published in the Sioux Falls daily Argus-Leader, being an official newspaper of Minnehaha County, South Dakota, for two successive weekly publications prior to said hearing on April 17, 1908, and April 24, 1908, and that said notice of apportionment fixed a time and place for equalization of the proportion of benefits to the several lands, tracts, lots, streets and railways embraced within said drainage district No. 1 which would be benefited by the construction thereof, gave the route of said Drainage Ditch No. 1 and made references to the maps and profiles of said ditch on file in the office of the County Auditor, gave the bottom width of said ditch and the exact course thereof, and notified all such owners and all persons interested, and summoned said persons to show cause at the time and place appointed, namely, May 5, 1908, at two o'clock P. M. at the office of the County Auditor of Minnehaha County, South Dakota, in the court house in said county and state, why the proportion of benefits should not be fixed as stated, and said determination of said Board made final, and as to this plaintiff, after naming this plaintiff Railway Company, gave the descriptions of the property benefited and the number of units, as set forth in Paragraph 20 of plaintiff's bill of complaint.

[fol. 124] That thereafter and on October 10, 1910, the Board of County Commissioners of Minnehaha County, South Dakota, fixed the apportionments of benefit for Drainage Ditch No. 2, and gave notice thereof, by posting said notice as required by law and publication thereof in the Sioux Falls daily Argus-Leader, an official newspaper of Minnehaha County, South Dakota, on October 15 and 22, 1910, which notice fixed Thursday, November 3, 1910 at two o'clock P. M. at the office of the County Auditor of Minnehaha County, South Dakota, in the county court house in said county and state, as the time and place for equalizing the proportion of benefits to the several lands, tracts, lots, streets and railways embraced within said drainage district, describing the route of said Drainage Ditch No. 2 in detail, gave the bottom width of said ditch and gave notice to and summoned all persons interested and affected thereby to show cause at the aforesaid time and place why the proportion of benefits should not be fixed as stated, and said notice and determination of said Board made final,

which said notice named the plaintiff Railway Company and described the property benefited and apportioned the number of units as set forth in Paragraph 20 of plaintiff's bill of complaint. And that thereafter the said plaintiff Railway Company paid its proportionate share of the cost of said ditch.

That by reason of the decision of said federal cases, this plaintiff Railway Company must now be assessed in accordance with the provisions of law in relation to repair and maintenance of said old ditch No. 1 or Ditch No. 2, and that plaintiff Railway Company herein has had its day in court and received the notices hereinbefore mentioned and described.

[fol. 125] It is further alleged that said notices, as well as Paragraph 20 of plaintiff's bill of complaint, show clearly the property that may be assessed for the repair and maintenance of said ditches.

That these defendants deny each and every other allegation, matter and statement containeed in Paragraph 24 of plaintiff's bill of complaint, except as hereinbefore expressly admitted.

XXV

These defendants allege that on August 1, 1921, they met pursuant to said notice and hearing upon equalization, Exhibit C, and no one appearing before them and the plaintiff herein not filing any written objections with said Board against the apportionment made, entered its order as follow:

"Therefore, Be it Resolved that the consideration and equalization of the proportion of benefits on Drainage Ditch No-. 1 and 2 be and the same is continued and adjourned until the 22d day of August, 1921 at two o'clock P. M. of that day",

which order and resolution of adjournment was again passed from time to time until the 4th day of April, 1924, which said adjournments were caused by the interlocutory order of the above named court. That on the 4th day of April, 1924, these defendants met pursuant to order of adjournment and made and entered the following resolution and order of adjournment:

"Whereas none of the persons heertofore notified in the notice heretofore given herein appeared at the time indicated and filed protests or objections to the proportions of benefit tentatively fixed by the Board, or at all,

[fol. 126] "Therefore, Be it Resolved that the Board of County Commissioners, for the purpose of entering their order finally equalizing and fixing the proportion of benefits received, pursuant to said notice (Exhibit C) and as tentatively fixed, be further continued and adjourned to the 5th day of November, 1924 at 2 o'clock P. M. of said day",

which order and resolution of adjournment has from time to time been again passed by said Board, and that the next adjourned meeting of said Board upon said notice of hearing is July 9, 1927; and these defendants further allege that they have not lost jurisdiction of said matter or to enter their final order herein, as their said proceedings have been interpreted by the Supreme Court of the State of South Dakota in the case of State v. Risty, et al., reported in 213 N. W. 952.

And they further allege that said Exhibit C, under the decisions of the federal courts in the case presented to said courts in which the parties hereto were the respective parties thereto, and in which the issues made were the same as the issues herein, is surplusage and that the plaintiff Railway Company herein must, under said decisions, be assessed to pay the costs and repair of said Drainage Ditch No. 1 or Drainage Ditch No. 2 under the law governing the same.

That these defendants deny each and every other allegation, matter and statement contained in said Paragraph 25 not hereinbefore expressly admitted.

[fol. 127] XXVI

These defendants deny that the drainage laws set forth in Paragraph 5 of plaintiff's bill of complaint were and are unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, and allege the fact to be that said law does provide for the selection of a tract of any kind of land or property in the drainage area by said Board, the benefit received by which

is taken as a unit or yardstick of measurement from which to measure the benefits received by all other tracts or property of any kind or character in said drainage area, and that the unit so determined in this case was the sum of $25.00, and that such method, rule or basis is one that is fixed by the law, as interpreted by the Supreme Court of the State of South Dakota in the case of Milne vs. McKinnon, 32 S. D. 627, and one which will produce approximately correct results, and that said basis, rule or yardstick of measurement is applicable in like manner to tracts of land, highways, railroads or other property within said drainage area, and permits for the levying of an assessment with due regard and proportion upon each, any and all of said kinds of property. That a notice of hearing and hearing is given to each owner of agricultural land and each property owner within the district, which is constitutionally sufficient in that the notice required and so given is one that is reasonably probable to bring notice to the person affected, and the hearing required and given is one at which the person affected may test whether he has received any benefit at all, and if none, his land or property is exempted; whether the benefit to his land is equal to or more or less than the benefit to the unit, thereby determined whether or not his [fol. 128] land is taken without just compensation and without due process of law; if his land is benefited, the extent of such benefit; and whether the unit is benefited, and if so, how much; and the relative benefit of the protestant's property to the unit; whether the proceedings are legal or illegal; State v. Risty, 213 N. W. 952; Milne v. McKinnon, 32 S. D. 627; Curtis v. Pound, 32 S. D. 492; and that said drainage statutes place the determination of these proportions of benefits and the amount thereof in the hands of a tribunal, or the Board of County Commissioners of each county, and that said law is permissible and constitutional as said law has been interpreted by the Supreme Court of the State of South Dakota in Lumber Co. v. McMackin, 31 S. D. 507; Davison County v. Watertown Tile & Construction Co., 47 S. D. 101.

These defendants allege that no equalization of the proportion of benefits has yet been entered and filed by the defendant Board and that until such equalization has been made, entered and filed, the acts of the Board in making

said apportionment cannot be arbitrary, unjust and discriminatory, fanciful and speculative, or upon an arbitrary, fanciful or speculative basis, because said hearing allows all persons affected to determine the just amount of benefit received by such persons affected, even to the extent of no benefit whatsoever. State v. Risty, 213 N. W. 952. That in the event an error was made in said apportionment or an erroneous method or base used by which a wrong result may have been reached is a matter which should be taken advantage of at said meeting of equalization provided by the law, as said law has been interpreted by the Supreme Court [fol. 129] of the State of South Dakota in the case of Milne v. McKinnon, 32 S. D. 627, and that this action by the plaintiff is premature and that this court is without right or authority in law to direct the action of the defendant Board as a statutory tribunal to determine said matters upon said equalization hearing or to exercise the powers of said Board at said equalization hearing. That this Board and the predecessors, accompanied by said Chenoweth & Rettinghouse, personally examined all of the tracts of land and property within the drainage area and described in Exhibit C, before making said apportionment, and that they selected a tract of land, being one acre, and upon their best judgment decided that said tract was worth $100 before said drainage improvements were made and $125 after said drainage improvements were made. That the difference between these two sums was $25.00, and that said sum of $25.00 thereupon and thereby became the unit of benefit, from which to measure the benefits received by all other tracts of land and property within such drainage area. That said unit of benefit of $25.00 received by said tract of land was and can be used as a unit from which to estimate the proportionate benefit received by any other tract of land, highways or property within such drainage area, as said law has been interpreted by the Supreme Court of the State of South Dakota, in the case of Milne v. McKinnon, 32, S. D. 627. That thereafter said Board, in viewing other tracts and other property, determined the value to the said tracts and property prior to and subsequent to the installation of this project and upon determination of the difference between said two sums, the same was divided by [fol. 130] said unit of benefit of $25 to determine the num-

ber of units of actual benefit received by each tract or property. That said total number of units of actual benefit were then added together in arriving at the sum of -32,549.62, the total number of units of actual benefit in said drainage area, and that the assessed value of the unit was then determined by dividing the total amount of costs of said project by the total number of units of actual benefit apportioned in said drainage area, thereby arriving at the assessed value of each unit so apportioned. That this defendant Board in viewing said tracts and properties, exercised their best judgment as to the values of said tracts and properties both before and after said project was completed. That the yardstick of measurement or basis used was identical as to all of said properties and was the sum of $25.00, and that the apportionment to the plaintiff herein is in proportion and is substantially the amount of benefit which the plaintiff is now and will continue to receive from said drainage project, and is in proportion to the apportionment made against the agricultural lands; and that these defendants deny each and every allegation, except as hereinbefore expressly admitted, in said Paragraph 26 of plaintiff's bill of complaint.

Wherefore these defendants pray that plaintiff's motion for an interlocutory injunction be denied, and that these defendants have judgment for their costs, and for such other and further relief as to the Court may seem just and equitable.

[fol. 131] Dated July 6, 1927.

A. G. Risty, Chris Olsen, Fletcher Alguire, L. E. Larson, W. H. Stringham, Board of County Commissioners of Minnehaha County, South Dakota.

Subscribed and sworn to before me this 6th day of July, 1927. J. H. Fitzpatrick, Notary Public, South Dakota. (Notarial Seal.)

[File endorsement omitted.]

[fol. 132] IN UNITED STATES DISTRICT COURT

EXHIBITS IN EVIDENCE—Filed July 7, 1927

Drainage Ditch No. 2

March 6, 1912.

Resolution

Whereas the following is a statement containing the itemized cost of Drainage Ditch No. 2, Minnehaha County, South Dakota.

Contractor	$48,434.40
Right of way	10,089.00
Bridges	7,311.54
Interest on warrants	8,507.18
Engineering	2,556.89
Attorney's fees	1,500.00
Printing	690.45
Maintenance	600.00
Co. Commsrs per diem & mileage	467.93
Auditor & Treasurer	403.51
Abstractor	215.00
Livery hire	167.20
Attorney's expenses	125.44
Sheriff fees	37.65
	$81,106.19

Therefore be it resolved that the above statement be published once in the official newspapers of the County as required by Chapter 131 of the Laws of 1911 of the State of South Dakota.

Filed in the office of the Auditor of Minnehaha County, S. D. this 6th day of March 1912.

Henry Howe, County Auditor.

[fols. 133 & 134] R. S. S. 8490—Pub. of Statement of Costs

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

I, E. A. Tyler, Deputy County Auditor in and for the County of Minnehaha and State of South Dakota, do hereby

certify the annexed and foregoing to be a true and correct copy of one of the records and files in my office relative to the Commissioners' Proceedings upon Drainage Ditch No. 2, and particularly that proceeding dated March 6, 1912 and appearing at page 166 of Ditch Record B, and I further certify that I have compared the same with the original on file in my office, and that the same is a full, true and complete copy thereof and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of the said County at my office in the City of Sioux Falls, Minnehaha County, South Dakota, this 6th day of July A. D., 1927.

E. A. Tyler, Deputy County Auditor. (Seal County Auditor.)

[File endorsement omitted.]

[fol. 135] In the District Court of the United States for the District of South Dakota, Southern Division

File No. 621

The Board of County Commissioners of Minnehaha County, South Dakota, Plaintiff,

vs.

Chicago, Milwaukee & St. Paul Railway Company, Defendants

In re Appeal of Chicago, Milwaukee & St. Paul Railway Company, from assessment of proportion of benefits in the Matter of Drainage Ditch No. 2 in Minnehaha County, South Dakota.

Stipulation—Filed January 15, 1912

Whereas on the 4th day of November, 1910 the Board of County Commissioners of Minnehaha County, South Dakota did enter an order in the matter of Drainage Ditch No. 2, equalizing the assessment of the proportion of benefits

against the right of way of the Chicago, Milwaukee & St. Paul Railway Company as laid out and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28 and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103, Range 49, and Section 32, Township 104, Range 49 west, 5th p. m., within the drainage area (the above being the Sioux Falls and Egan line); also across Sections 5, 8 and 9, Township 102, Range 49 west, 5th p. m., within the drainage area (being the Renner and Madison line). Total 41.5 miles, 167.06 acres, in the sum of two hundred and fifty-seven (257) unites; and

Whereas the said railway company did appeal to the Circuit Court of Minnehaha County, South Dakota from the said order, and did thereupon remove said cause to the [fol. 136] United States Circuit Court for the District of South Dakota, Southern Division, which court is now merged into the District Court of the United States for the District of South Dakota, Southern Division; and

Whereas it is impossible, at this time, to accurately specify the money value of each unit of assessment in the said Drainage Ditch proceedings:

Now, therefore, in the interest of saving expensive litigation, it is hereby stipulated and agreed by and between the said Railway Company and said Board of County Commissioners, subject to the order of Court that judgment may be entered, fixing the equalized proportion of benefits chargeable to said right of way of said railway company in said matter in the number of units that will, when the final assessment is made, in the said Drainage Ditch proceedings, produce the sum of Eighty five hundred Dollars, and that the said money assessment hereafter to be made shall be entered against said railway property in the sum of Eighty-five hundred Dollars, and in no greater or less sum, and that no costs shall be taxed to either party on account of said appeal or the removal thereof to this court, and that the said railway company shall not be called upon to pay for the transcript of the record of the said drainage ditch proceedings transmitted pursuant to said appeal, and that

each party hereto will pay one-half of the clerk's fees for final record in the office of the Clerk of this Court.

Dated January 3d, 1912.

The Board of County Commissioners of Minnehaha County, South Dakota, by Thomas McKinnon, Chairman, and John H. Gates, Attorney. Chicago,
[fols. 137 & 138] Milwaukee & St. Paul Railway Company, by Williams G. Porter, Attorney.

[File endorsements omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 139] IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DIVISION OF THE DISTRICT OF SOUTH DAKOTA

Law. No. 621, S. Div.

BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY, SOUTH DAKOTA, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant

JUDGMENT—January 15th, A. D. 1912

The above entitled action came on for hearing before the Court on the 15th day of January, A. D. 1912, upon the written stipulation of the parties hereto for judgment; Present and presiding, the Honorable James D. Elliott, Judge, and the other officers of the Court: John H. Gates, Esq., appearing for the plaintiff and William G. Porter, Esq., appearing for the defendant; whereupon an order was made and entered of record providing for judgment;

Now, pursuant to the provisions of said stipulation, and on the order of the Court, on this 15th day of January, A. D. 1912, it is Considered and Adjudged that the equalized proportion of benefits made by the Board of County Com-

missioners of said County on November 4th, 1910, be and the same is hereby modified by reducing the number of units assessed against the right of way of the Chicago, Milwaukee & St. Paul Railway Company as laid out and located across Sections Four and Nine, Township One Hundred One, Range Forty-nine, and Sections Four, Nine, Sixteen, Twenty-one, Twenty-eight and Thirty-three, Township One Hundred Two, Range Forty-nine and Sections Five, Eight, Seventeen, Twenty, Twenty-eight, Twenty-nine and Thirty-three, Township One Hundred Three, Range Forty-nine [fol. 140] and Section Thirty-two, Township One Hundred Four, Range Forty-nine west, Fifth P. M., within the drainage area, also across Sections Five, Eight and Nine Township One Hundred Two, Range Forty-nine West Fifth P. M., within the drainage area, from two hundred Fifty-seven units to the number of units that will when the final assessment is made in the said drainage ditch proceedings produce the sum of Eight Thousand Five Hundred Dollars;

It is further Considered and Adjudged that the money assessment hereafter to be levied against said property of said railway company, pursuant to the said equalized proportion of benefits as herein modified be entered against said property in the sum of Eight Thousand Five Hundred Dollars and in no greater or less sum.

In testimony whereof, I Oliver S. Pendar, Clerk of the District Court of the United States, for the District of South Dakota, do hereunto set my hand and affix the seal of said Court, this 15th day of January, A. D. 1912.

Oliver S. Pendar, Clerk.

Certificate to foregoing paper omitted in printing.

[fol. 141] [File endorsement omitted.]

[fol. 142] $8,500.00 Treasurer's Office, Minnehaha County, South Dakota, No. 13

Sioux Falls, April 8th, 1912.

Received of C. M. and St. P. Ry. Co. Eighty five hundred and no/100 Dollars for the whole of Drainage Assessment for Drainage Ditch No. 2 on the real estate below described:

Description	Section or lot	Township or block	Range	Total assessment	Units of equalized proportion of benefits	Installment	Cost of sale	Penalty and interest	Amount paid
Rty as laid out and located across sec's 4 & 9 twp. 101 Range 49 & sec's 4, 9, 16, 21, 28 & 33 twp. 102, Range 49 & sections 5, 8, 17, 20, 28, 29 & 33 Township 103 Range 49 & section 32 township 104 Range 49 West 5th P. M. within the drainage area. (The above being the Sioux Falls and Egan line.) Also across sections 5, 8 & 9 twp. 102 Range 49 West 5th P. M. within the drainage area (being the Madison and Renner Line).									
Total 14.5 miles				8,500 00	134 121				8,500 00

Copy of duplicate.

H. B. Benson, County Treasurer. B.

[fols. 143 & 144] Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 145] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING INJUNCTION—Filed July 14, 1927

The plaintiffs having filed their motion herein for an interlocutory injunction herein as prayed in the bill of complaint herein, and praying by said motion for the issuance of an interlocutory injunction suspending and restraining the enforcement, operation, and execution of Chapter 98 of the Session Laws of 1905, as amended and re-enacted as Chapter 134 of the Session Laws of 1907, and as amended and re-enacted as Sections 8458 to 8491 of the South Dakota Revised Code of 1919, and as amended at the Second Special Session of the Sixteenth Legislature of the State of South Dakota, by restraining the action of the County Commissioners, the County Auditor, and the County Treasurer of the county of Minnehaha in the state of South Dakota in the enforcement and execution of said statute upon the ground of the unconstitutionality of such statute, and said application for an interlocutory injunction having been presented to the Hon. James D. Elliott, District Judge of the District Court of the United States for the District of [fol. 146] South Dakota, and the said Hon. James D. Elliott having called to his assistance to hear and determine said application the Hon. Wilbur F. Booth, Circuit Judge of the Eighth Judicial Circuit, and the Hon. George C. Scott, District Judge of the Northern District of Iowa in said Eighth Judicial Circuit, and five days' notice of the hearing of the application for said interlocutory injunction having been given to the Governor and to the Attorney General of the state of South Dakota and to the defendants above named in said suit, and said application having been brought on for hearing before the Court composed of the Hon. Wilbur F.

Booth, Circuit Judge, the Hon. James D. Elliott, District Judge, and the Hon. George C. Scott, District Judge, as aforesaid, at Sioux Falls, in said District of South Dakota, upon the 7th day of July, 1927, and the plaintiffs appearing by Messrs. Bailey & Voorhees, their solicitors, and the defendants appearing by Mr. E. O. Jones and Mr. Norman B. Bartlett, their solicitors, and the Court having heard and considered said application, it is hereby ordered that the motion of the plaintiffs for an interlocutory injunction upon the ground of the unconstitutionality of said statute as aforesaid be and the same is hereby denied.

It is further ordered that plaintiffs be allowed their due exception to this order.

Done in open Court at Sioux Falls in said District of South Dakota this 12 day of July, 1927.

[fols. 147 & 148] By the Court.

Wilbur F. Booth, Geo. C. Scott, Jas. D. Elliott, Judges. Attest: Roy B. Marker, Clerk. (Seal of Court.)

[File endorsement omitted.]

[fol. 149] In United States District Court

[Title omitted]

Assignments of Error—Filed July 27, 1927

Now come H. E. Byram, Mark W. Potter, and Edward J. Brundage, as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, the plaintiffs in the above entitled suit, and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled suit from the order made in said suit by the Court composed of the Honorable Wilbur F. Booth, Circuit Judge, and the Honorable James D. Elliott and the Honorable George C. Scott, District Judges, denying the motion of the plaintiffs for an interlocutory injunction, which order bears date July 12, 1927, and was entered in the office of the Clerk of said District Court upon the 14th day of July, 1927.

First

That the United States District Court for the District of South Dakota, composed as aforesaid of the Honorable Wilbur F. Booth, Circuit Judge, and the Honorable James [fol. 150] D. Elliott and the Honorable George C. Scott, District Judges, erred in overruling the motion of the plaintiffs and appellants for the issuance of an interlocutory injunction in the above entitled suit.

Second

That said Court erred in not granting an interlocutory injunction as prayed in the bill of complaint in said suit and as asked by the plaintiffs in their motion in said suit for such injunction.

Third

That the Court erred in holding that the drainage statute of the State of South Dakota, to-wit, Chapter 98 of the Session Laws of 1905 of the State of South Dakota, as amended and reenacted as Chapter 134 of the Session Laws of 1907 of the State of South Dakota, and as amended and reenacted as Sections 8458 to 8491 of the South Dakota Revised Code of 1919, and as amended at the Second Special Session of the Sixteenth Legislature of the State of South Dakota, is not in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, said plaintiffs and appellants pray that said order be reversed and that said District Court for the District of South Dakota be ordered to enter an order and decree reversing the decision of said Court denying the motion of the plaintiffs and appellants for an interlocutory injunction in said cause.

Bailey & Voorhees, Solicitors for Plaintiffs and Appellants.

[fol. 151] [File endorsement omitted.]

[fol. 152] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 27, 1927

To the Honorable Wilbur F. Booth, Circuit Judge, the Honorable James D. Elliott, District Judge, and the Honorable George C. Scott, District Judge:

The above named plaintiffs, H. E. Byram, Mark W. Potter, and Edward J. Brundage, as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, feeling aggrieved by the order entered in the above entitled suit on the 14th day of July, 1927, denying their motion for an interlocutory injunction, do hereby appeal from said order to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said order was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of such Court in such cases made and provided.

[fol. 153] And, your petitioners further pray that the proper order relating to the proper security to be required of them be made.

Dated, July 23rd, 1927.

H. E. Byram, Mark W. Potter, Edward J. Brundage, as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, by Bailey & Voorhees, Their Solicitors.

[File endorsement omitted.]

[fol. 154] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 30, 1927

On motion of Messrs. Bailey & Voorhees, solicitors and counsel for the plaintiffs, H. E. Byram, Mark W. Potter, and Edward J. Brundage, as Receivers of the Chicago, Milwau-

kee & St. Paul Railway Company, it is hereby ordered that an appeal to the Supreme Court of the United States from the order heretofore filed and entered herein upon the 14th day of July, 1927, denying the motion of the plaintiffs for an interlocutory injunction herein, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars ($500).

Dated, July 26, 1927.

Wilbur F. Booth, Geo. C. Scott, Jas. D. Elliott, Judges.

Attest: Roy B. Marker, Clerk. (Seal of Court.)

[fol. 155] [File endorsement omitted.]

[fols. 156-165] Bond on appeal for $500.00 approved and filed July 30, 1927, omitted in printing.

[fol. 166] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 167] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed September 1, 1927

The appellants in the above entitled cause do hereby state that upon this appeal the points upon which they intend to rely are that the drainage statute of the State of South Dakota, to-wit, Chapter 98 of the Session Laws of 1905 of the State of South Dakota, as amended and re-enacted as Chapter 134 of the Session Laws of 1907 of the State of South Dakota, and as amended and re-enacted as Sec-

tions 8458 to 8491 of the South Dakota Revised Code of 1919, and as amended at the Second Special Session of the Sixteenth Legislature of the State of South Dakota, is in violation of the Fourteenth Amendment to the Constitution of the United States.

The parts of the record which the appellants think necessary for the consideration of said points are as follows, to-wit:

1. The bill of complaint.

2. The motion of the plaintiffs for an interlocutory injunction.

3. The notice to the Governor and to the Attorney General of the State of South Dakota and to the defendants [fol. 168] of the hearing upon the motion for an interlocutory injunction.

4. The showing of the defendants in opposition to the motion for an interlocutory injunction (said showing being entitled, showing in response to order to show cause).

5. The order denying the motion of the plaintiff for an interlocutory injunction.

6. The petition for appeal, together with the assignment of errors.

7. The order allowing appeal.

8. The bond on appeal with the order approving the same.

9. The citation on appeal.

Dated, Sioux Falls, South Dakota, August 29, 1927.

C. O. Bailey & H. E. Judge, Solicitors for Appellants. H. H. Triestal & O. V. Dyrne, of Counsel.

[fol. 168a] Due, timely and personal service on the within Præcipe for Printed Record acknowledged this 29th day of August A. D. 1927, at Sioux Falls, S. D.

E. O. Jones and N. B. Bartlett, Attorneys for Appellees.

[fol. 168b] [File endorsement omitted.]

[fol. 169] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED —Filed Sept. 2, 1927

The appellees in the above entitled cause do hereby designate additional parts of the record to be printed which they think material to the issues to be presented and upon which they will rely, from which it will appear that the constitutionality of the drainage statute of the State of South Dakota is not and cannot be involved in this cause.

The additional parts of the record, which appellees think necessary for the consideration of said points, are as follows, to-wit:

1. Certified copy of the Resolution of the Board of County Commissioners fixing the total cost of Drainage Ditch No. 2, filed July 7, 1927.

2. Certified copy of the Stipulation signed by the plaintiff and defendants herein, in the matter of the appeal of the plaintiff from assessment of proportion of benefits in re: Drainage Ditch No. 2, dated January 3, 1912, filed July 7, 1927.

3. Certified copy of judgment entered in this court upon above stipulation on January 15, 1912, filed herein July 7, 1927.

4. Certified copy of tax receipt, dated April 8, 1912, showing payment of tax on Drainage Ditch No. 2, filed herein July 7, 1927.

[fol. 170] Said above designated matters to be inserted as part of the defendants' showing designated at No. 4 of the appellants' præcipe.

Dated at Sioux Falls, South Dakota, August 30, 1927.

E. O. Jones & N. B. Bartlett, Solicitors for Appellees. B. C. Matthews, J. H. Fitzpatrick & Enos G. Jones, of Counsel.

[fol. 171] Due, timely and personal service of the within præcipe is hereby acknowledged by delivery to us of true and correct copy thereof at Sioux Falls, So. Dak. this 30th

day of August, 1927. C. O. Bailey and H. E. Judge, Attorney- for Appellant-.

[fol. 172] [File endorsement omitted.]

File No. 32,953. South Dakota D. C. U. S. Term No. 501. H. E. Bryan, Mark W. Potter, and Edward J. Brundage, as Receivers, etc., Appellants, vs. A. G. Risty, Chris Olson, L. E. Larson, et al., etc., et al. Filed September 1, 1927. File No. 32,953.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 501

H. E. BYRAM, MARK W. POTTER, AND EDWARD J. BRUNDAGE, AS RECEIVERS, ETC., APPELLANTS,

vs.

A. G. RISTY, CHRIS OLSON, L. E. LARSON, ET AL., ETC., ET AL, APPELLEES.

BRIEF AND ARGUMENT FOR APPELLANTS

SUBJECT INDEX

	Page
Statement of Facts	6
Unconstitutionality of South Dakota Drainage Law under Fourteenth Amendment to Constitution	15
Unconstitutionality of South Dakota Drainage Law as Applied to Railroad Companies	30
Unconstitutionality of South Dakota Drainage Law for Want of Notice to Railroad Companies	34

Page
Unconstitutionality of South Dakota Drainage Law by reason of Assessments not being Limited to Amount of Benefits ---------- 36
In conclusion ---------- 59

TABLE OF CASES CITED

Browning v. Hooper, 269 U. S. 396---------- 28
Central of Georgia Railway Company v. Wright, 207 U. S. 127 ----------28, 33
Chicago, Rock Island & Pacific Railway Company v. Risty, 282 Fed. 364 ----------11, 12
Embree v. Kansas City Road District, 240 U. S. 242, 22, 28
Fallbrook Irrigation District v. Bradley, 164 U. S. 112 ----------21, 24, 25, 28, 37
Londoner v. Denver, 210 U. S. 373----------28, 33
Martin v. District of Columbia, 205 U. S. 135---------- 38
Milheim v. Moffat Tunnel District, 262 U. S. 710----- 26
Myles Salt Company, Ltd. v. Iberia Drainage District, 239 U. S. 478 ---------- 28
Pawhuska v. Pawhuska Oil Company, 250 U. S. 394--- 13
Risty v. Chicago, Rock Island & Pacific Railway Co., 297 Fed. 710 ----------12, 30
Risty v. Chicago, Rock Island & Pacific Railway Company, 270 U. S. 378 ----------5, 6, 12, 13, 30, 39
Risty v. City of Sioux Falls, 270 U. S. 378 ---------- 13
Risty v. Chicago, Milwaukee & St. Paul Railway Company, 270 U. S. 378 ----------5, 13
Road Improvement District No. 2 v. Missouri Pacific Railway Company, 275 Fed. 600 ----------33, 37
Soliah v. Heskin, 222 U. S. 522 ----------25, 26, 28, 33
Spencer v. Merchant, 125 U. S. 345----------36, 37
State v. Risty, 213 N. W. 952-------6, 13, 20, 27, 29, 34, 40
St. Louis Land Company v. Kansas City, 241 U. S. 419, 26
Trenton v. New Jersey, 262 U. S. 181---------- 13

Page
Turner v. Wade, 254 U. S. 64 ..... 28, 33
Village of Norwood v. Barber, 176 U. S. 269..... 38
Voight v. Detroit City, 184 U. S. 115..... 26

OPINIONS OF FEDERAL AND STATE COURTS IN THIS LITIGATION

Chicago, Rock Island & Pacific Railway Company v. Risty, 282 Fed. 364.

Risty v. Chicago, Rock Island & Pacific Railway Company, 297 Fed. 710; 270 U. S. 378.

Risty v. Chicago, Milwaukee & St. Paul Railway Company, 266 U. S. 622; 270 U. S. 378.

State of South Dakota v. Risty, 213 N. W. 952.

BRIEF AND ARGUMENT FOR APPELLANT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 501

H. E. BYRAM, MARK W. POTTER, AND EDWARD J. BRUNDAGE, AS RECEIVERS, ETC., APPELLANTS,

vs

A. G. RISTY, CHRIS OLSON, L. E. LARSON, ET AL., ETC., ET AL.

The appellants, H. E. Byram, Mark W. Potter, and Edward J. Brundage, as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, filed their bill in the District Court for the District of South Dakota against A. G. Risty, Chris Olson, L. E. Larson, Fletcher Alguire, and William Stringham, as County Commissioners of Minnehaha County, South Dakota, Dale E. Howe, as County Auditor of Minnehaha County, South Dakota, and Fred A. Mundt, as County Treasurer of Minnehaha County, South Dakota, to enjoin the enforcement of the agricultural land drainage statute of the State of South Dakota upon the ground of the unconstitutionality of such statute. (Transcript pp. 1-94). A motion for an interlocutory injunction was heard before a three-judge court and from the order of that court denying the injunction this appeal is taken to this Court under the provisions of 28 USCA §380. (Transcript pp. 94-136).

The matters in controversy in this suit were before this Court in the cases of *Risty v. Chicago, Rock Island & Pacific Railway Company,* and *Risty v. Chicago, Milwaukee & St. Paul Railway Company,* 270 U. S. 378. In those

cases questions were presented involving the constitutionality of the South Dakota drainage statute but were not passed upon by the Court as the decision was based upon other grounds. Subsequently the Supreme Court of South Dakota in the case of *State v. Risty*, 213 N. W. 952, has declined to follow the decision of this Court in *Risty v. Chicago, Rock Island & Pacific Railway Company*, and has made holdings, in a controversy arising from the same transaction and under the same state of facts, in direct conflict with the decision of this Court. The facts upon which this litigation arise are in brief, as follows:

STATEMENT OF FACTS

At the election in November, 1906, there was adopted an amendment to the constitution of South Dakota which is known as Section 6 of Article XXI of that constitution and which is as follows:

"§6. The drainage of agricultural lands is hereby de-
"clared to be a public purpose and the legislature may
"provide therefor, and may provide for the organization
"of drainage districts for the drainage of lands for any
"public use, and may vest the corporate authorities there-
"of, and the corporate authorities of counties, townships
"and municipalities, with power to construct levees,
"drains and ditches, and to keep in repair all drains,
"ditches and levees heretofore constructed under the laws
"of this state, by special assessments upon the property
"benefited thereby, according to benefits received."

The legislature of South Dakota has never enacted any law to carry into effect the powers conferred upon it by the foregoing constitutional amendment providing for the organization of drainage districts, but has enacted, or attempted to enact, various laws vesting the corporate authorities of the several counties of the state with power to construct levees, drains, and ditches and to keep the same in repair by special assessments upon the property benefited thereby.

The first drainage ditch enactment was Chapter 98 of the Session Laws of South Dakota, 1905, which was passed prior to the adoption of Section 6 of Article XXI of the

South Dakota constitution. After the adoption of that section a new law was passed which is known as Chapter 134 of the Session Laws of South Dakota, 1907. The 1907 law was amended by Chapter 102 of the Session Laws of South Dakota, 1909. The 1907 law was further amended by Chapters 207 and 208 of the Session Laws of South Dakota, 1917. In 1919 the entire drainage law was re-compiled and re-enected as Sections 8458 to 8507, South Dakota Revised Code of 1919. Further amendments were enacted in 1919 which appear as Chapter 46 of the Session Laws of the First Special Session of the Sixteenth Legislature of South Dakota.

The various statutory enactments of the State of South Dakota bearing upon the questions at issue in this suit were contained in "Exhibit A" to the bill of complaint and are to be found in the Transcript of Record, pp. 26-44.

The Big Sioux river has its origin in a lake in the northeastern part of South Dakota and runs thence in a generally southerly direction, and in the eastern part of South Dakota (of which state it is in places the boundary line) for about 100 miles and empties into the Missouri river at a point a short distance north of Sioux City, Iowa. In its course the Big Sioux river passes through the business center of the city of Sioux Falls. It strikes Minnehaha county, in which Sioux Falls is situated, at its north line and flows in a generally southerly direction, but with many bends and curves, for a distance, in a straight line, of twenty-four miles, running in its course two and one-half miles west of the business center of the city of Sioux Falls and south to a point three miles south of the business center. It then flows in an easterly direction for about three miles and then turns north, running through the business center of the city of Sioux Falls and northerly to a point two miles from the business center. It then runs in an easterly direction for several miles when it again resumes its southerly course towards its junction with the Missouri river. The consequence is that at the city of Sioux Falls the river runs like an inverted letter "S," upon the bar of which Sioux Falls is situated. (Transcript pp. 5-6).

From a point about five miles south of where the Big Sioux enters Minnehaha county it runs through a valley or flat from two to four miles in width until it reaches a point about three miles southwest of the business center of the city of Sioux Falls. From there on until it reaches the northeastern portion of the city the river is confined by high banks on either side and with no valley interposing between them. (Transcript pp. 5-7).

There is comparatively little fall between the point where the Big Sioux river enters the flat about fifteen miles north of the city of Sioux Falls and the northeastern section of the city where the river passes over a series of falls of an aggregate height of more than one hundred feet. The result is that the level of the river bed, as it passes over the falls in the northeastern portion of the city of Sioux Falls, is over one hundred feet below the level of the river at a point, four miles to the westward, where it passes to the west of the city of Sioux Falls. (Transcript pp. 5-6).

In December, 1907, the Board of County Commissioners of Minnehaha county, purporting to act under the authority of Chapter 134 Session Laws of South Dakota, 1907, established a drainage ditch known as Drainage Ditch No. 1. This ditch was some three miles in length and extended, from a point on the Big Sioux river below the falls, northward to a point on the flat north of the city of Sioux Falls. In 1910, the Board of County Commissioners established a second ditch, known as Drainage Ditch No. 2, which commenced at the north end of Drainage Ditch No. 1 and extended in a northerly direction for about twelve miles. (Transcript pp. 4-5).

At the point Drainage Ditch No. 1 empties into the Big Sioux river below the falls it passed over a hill in a descent of about one hundred feet. The bottom of the ditch was covered along this descent with concrete, making a spillway through which the water accumulating upon the flats could run to reach the channel of the Big Sioux river below the falls. (Transcript pp. 5-7).

Drainage Ditch No. 1 and Drainage Ditch No. 2 operated more or less successfully in draining the flats until

the spring of 1916 at which time, during a somewhat heavy rainfall, the concrete bottom of Drainage Ditch No. 1, (or its spillway) washed out and the water began cutting a channel through the hill. (Transcript pp. 6-7).

The fact that the concrete spillway had washed out did not in any manner decrease the efficiency of Drainage Ditch No. 1 and Drainage Ditch No. 2 as drainage propositions. In fact, the washout of the spillway made them still more efficient for draining purposes, and if they had been left alone they would very speedily have settled the question of drainage for the lands upon the flats. The effect of the washout was to open a passage for all of the water which accumulated upon the flats into the channel of the Big Sioux river below the falls and this channel was amply sufficient to have taken care of all of the water which ever accumulated upon the flats. In fact, it was a perfect success as a drainage proposition. (Transcript pp. 6-7).

Unfortunately, while Drainage Ditch No. 1, after its spillway was washed out, succeeded in doing all in the way of drainage that the owners of the lands upon the flats desired to have done, it seriously affected other interests. If the water had been allowed to go without hindrance through the new channel it would, within a very short time, have diverted the entire course of the water in the Big Sioux river and would have formed a new channel for the river across the flats north of the city of Sioux Falls, in which channel all of the water coming down the river could have flowed into the channel below the falls without passing around and through the city of Sioux Falls and over the falls, thus cutting off about twelve miles of the river channel. The further effect would have been to destroy the waterpower formed by the dams across the Big Sioux river in the city of Sioux Falls above the falls, as the only water which would have flowed in the Big Sioux river channel through the city of Sioux Falls and over the falls would have been the water from Skunk creek, a tributary of the Big Sioux river, emptying into that stream south of the city of Sioux Falls. Another effect of allowing the river to run through its new channel would have been to destroy the municipal water plant of

the city of Sioux Falls by draining the water from the gravel bed from which the city obtained its water supply. (Transcript pp. 6-7).

After the spillway at the outlet of Drainage Ditch No. 1 had washed out in March, 1916, various plans were proposed looking toward the control of the water which flowed through the ditch.

In October, 1916, the Board of County Commissioners took proceedings by which they attempted to establish a new ditch project which they denominated "Drainage Ditch No. 1 and 2." Thereafter, all proceedings with respect to Drainage Ditch No. 1 and with respect to Drainage Ditch No. 2 were abandoned and all subsequent work was done by the Board of County Commissioners upon the new project, "Drainage Ditch No. 1 and 2." (Transcript pp. 8-9).

The Board of County Commissioners, after organizing Drainage Ditch No. 1 and 2, proceeded to construct additional ditches, cut-offs, and dams in the flats above the city of Sioux Falls, and at the former outlet of Drainage Ditch No. 1, to construct a spillway, and other water retaining works for the purpose of controlling the flow of the water through the ditches. The result was that at the end of the construction period the cost of the work done by the Board of County Commissioners upon Drainage Ditch No. 1 and 2 had amounted to a sum in excess of $250,000, of which upwards of $150,000 was expended upon the spillway and other water retaining works at the outlet of the ditch. For the amount expended, the Board of County Commissioners issued warrants upon the Drainage Ditch No. 1 and 2. These warrants were taken by the laborers and material men employed upon the construction work and were in most instances discounted to the local banks in Minnehaha county. (Transcript pp. 8-12).

After a number of abortive attempts to levy an assessment for the purpose of raising the money to pay the warrants issued for the work done upon Drainage Ditch No. 1 and 2, the Board of County Commissioners, in June, 1921, adopted a notice of time and place for equalizing the proportion of benefits for the construction of the work on

Drainage Ditch No. 1 and 2, in which notice the proportion of benefits assessed against the Chicago, Milwaukee & St. Paul Railway Company was 1681 units out of a proposed total of 32549.62 units. (Transcript pp. 12-14, 89).

The Chicago, Milwaukee & St. Paul Railway Company and five other property-owners brought suits in the District Court for the District of South Dakota to enjoin the making of assessments for the work done upon Drainage Ditch No. 1 and 2. Temporary injunctions were granted *pendente lite*. The defendants named in the several bills were the Board of County Commissioners of Minnehaha County, the Auditor, and the Treasurer of that County. Subsequently, the various banks and other persons holding drainage ditch warrants were granted permission to intervene and became parties to the suits. Upon the hearing of the six suits upon their merits, final decrees were entered enjoining the Board of County Commissioners from making any assessment for the expense of the work done under the proceedings establishing Drainage Ditch No. 1 and 2 upon any property belonging to the various plaintiffs and situated outside of the assessment areas of the original Drainage Ditch No. 1 and the original Drainage Ditch No. 2. The decrees were by their terms without prejudice to the rights of the several plaintiffs to contest any assessment upon property owned by them which had formerly been assessed for Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company v. Risty*, 282 Fed. 364. Transcript pp. 90-94). In these six cases the several plaintiffs attacked the drainage ditch statute of South Dakota as unconstitutional and in violation of the fourteenth amendment to the Constitution of the United States. An attack was also made upon the regularity of the proceedings of the Board of County Commissioners of Minnehaha county under the statute, and questions were raised as to the proper construction to be given to the provisions of the South Dakota drainage statute. In the District Court permanent injunctions were granted to the plaintiffs in all of the six cases. There was, however, a conflict in the various cases as to the status of Drainage Ditch No. 1 and 2. In three of the cases both the plaintiffs and the defendants agreed

that Drainage Ditch No. 1 and 2 was a new and independent drainage ditch proposition, the Chicago, Milwaukee & St. Paul Railway Company being one of the plaintiffs which took this view of the situation. In the other three cases it was contended by the plaintiffs, but denied by the defendants, that Drainage Ditch No. 1 and 2 was merely a maintenance and repair project and a continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2. In the District Court permanent injunctions were granted to the plaintiffs in all of the six cases, and in his opinion filed in the District Court the District Judge took the position that Drainage Ditch No. 1 and 2 was merely a maintenance and repair proposition and a continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company v. Risty*, 282 Fed. 364).

Appeals were taken by the defendants and by the intervenors in the six cases to the Circuit Court of Appeals for the Eighth Circuit, in which court the decrees of the District Court were affirmed (*Risty v. Chicago, Rock Island & Pacific Railway Company*, 297 Fed. 710). The defendants and intervenors then took a second appeal to this Court where the decision of the Circuit Court of Appeals was affirmed, (*Risty v. Chicago, Rock Island & Pacific Railway Company*, 270 U. S. 378) in five of the cases.

In the six cases the constitutional objections to the South Dakota drainage ditch statute were urged in the Circuit Court of Appeals. In the opinion in the case, JUDGE KENYON held, "The constitutional questions "raised are grave, serious, and doubtful. Their determi- "nation is not necessary to the solution of these cases. "Therefore under the well established rule that the fed- "eral courts will not pass upon the constitutionality of "statutes unless absolutely necessary, we leave the ques- "tion aside." The Court then proceeded to affirm the decrees of the District Court on other grounds rising upon the construction of the South Dakota statute.

Upon the appeal in the six cases to this Court the question of the unconstitutionality of the South Dakota drainage statute was again urged, but the Court affirmed upon other grounds the decisions of the District Court and Cir-

cuit Court of Appeals in five of the cases, reversing the decree in the case of the *Risty v. City of Sioux Falls,* and ordering the bill in that case dismissed under the authority of *Trenton v. New Jersey,* 262 U. S. 181, and *Pawhuska v. Pawhuska Oil Company,* 250 U. S. 394. In the opinion MR. JUSTICE STONE says, "As our decision in "these cases turns upon the construction and application "of the state law we do not pass upon the constitutional "questions raised. They are, however, questions of sub- "stance and sufficient to give the court jurisdiction to pass "on the whole case." (*Risty v. Chicago, Rock Island & Pacific Railway Company,* 270 U. S. 378).

After the decision of this Court in *Risty v. Chicago, Milwaukee & St. Paul Railway Company,* 270 U. S. 378, the Supreme Court of South Dakota saw fit to take original jurisdiction of a suit brought in the name of the State of South Dakota against the Board of County Commissioners of Minnehaha county and involving an assessment upon property belonging to the state of South Dakota for the same drainage ditch construction work involved in the case of *Risty v. Chicago, Milwaukee & St. Paul Railway Company,* 270 U. S. 378 and involved in the case at bar. The decision of the Supreme Court of South Dakota in this case is reported as *State v. Risty,* 213 N. W. 952. The Supreme Court of South Dakota declined to follow the decision of this Court in *Risty v. Chicago, Milwaukee & St. St. Paul Railway Company,* 270 U. S. 378, and held that notwithstanding that decision it would proceed to construe the South Dakota statutes as it saw fit. In its opinion, the Supreme Court of South Dakota uses the following language:

"We are not unmindful of the decision of the Supreme "Court of the United States in the case of *A. G. Risty et "al. v. Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378, 46 S. Ct. "236, 70 L. Ed. 641, which court had under consideration "this same project, and although this court will give to "such decision most respectful consideration, yet, in cases "not arising upon the construction of the federal Consti- "tution or laws of the federal government, this court has "full jurisdiction and can adopt its own construction of "the state statutes even though such construction be at

"variance with the construction placed upon them by the "Supreme Court of the United States.

"That court recognized the full meaning of section "8458, R. C., but overlooked the connection between that "section and section 8476 and gave an improper inter- "pretation to section 8467. This latter section does not "apply to assessments for costs of maintenance of an old "ditch."

On June 23, 1927, the Appellants filed their bill of complaint in the District Court of the United States for the Southern Division of the District of South Dakota, against the County Commissioners, the County Auditor and the County Treasurer of Minnehaha county, South Dakota, praying for an injunction against the making of any apportionment of benefits or assessment upon the property of the Chicago, Milwaukee & St. Paul Railway for the payment of the costs of the drainage construction works in Drainage Ditch No. 1 and 2, upon the ground of the unconstitutionality of the South Dakota drainage statute. A motion for an interlocutory injunction was made by the plaintiffs and notice of the hearing upon such motion served upon the defendants and upon the Governor and the Attorney General of the State of South Dakota. An application was duly made to the District Judge to convene a three-judge court as provided by 28 USCA §380. The motion for an interlocutory injunction was heard by the three-judge court and an order entered denying the injunction. From this order this appeal is taken to this Court. (Transcript pp. 94-137).

The foregoing being the facts involved in this suit, we submit on behalf of the appellants the following

SPECIFICATION OF ERRORS.

Appellants specify the following errors relied upon on this appeal:

First. That the United States District Court, for the District of South Dakota, composed of the following: Honorable Wilbur F. Booth, Circuit Judge, and the Honorable James D. Elliott and the Honorable George C. Scott, District Judges, erred in overruling the motion of plaintiffs and appellants for the issuance of an interlocutory injunction.

Second. That said Court erred in not granting an interlocutory injunction as prayed in the bill of complaint and as asked by plaintiffs and appellants in their motion for said injunction.

Third. That the Court erred in holding that the drainage statute of the State of South Dakota, to-wit, Chapter 98 of the Session Laws of 1905 of the State of South Dakota, as amended and reenacted as Chapter 134 of the Session Laws of 1907 of the State of South Dakota, and as amended and reenacted as Sections 8458 to 8491 of the South Dakota Revised Code of 1919, and as amended at the Second Special Session of the Sixteenth Legislature of the State of South Dakota, is not in violation of the Fourteenth Amendment to the Constitution of the United States.

BRIEF AND ARGUMENT

I.

THE DRAINAGE STATUTE OF SOUTH DAKOTA IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR THE REASON THAT NO OPPORTUNITY IS GIVEN THE PROPERTY-OWNER TO BE HEARD AS TO HIS INCLUSION IN THE DRAINAGE ASSESSMENT AREA BEFORE THE CONSTRUCTION OF THE DRAINAGE WORK.

The first proposition which we desire to present for the consideration of the Court is that the entire South Dakota drainage law is unconstitutional as being in violation of the "due process of law" clause of the Fourteenth Amendment. The consideration of this question involves an analysis of the provisions of the South Dakota drainage statute as it existed at the time the Board of County Commissioners of Minnehaha county attempted to establish Drainage Ditch No. 1 and 2, and did the work thereunder. In considering this proposition it must at all times be borne in mind that all of the work, the cost of which was upwards of $250,000, was done by the Board of County Commissioners before any attempt was made to determine the property-owners, or property, upon which an apportionment of benefits, or an assessment was ultimately to be made to defray the cost. The South Dakota drainage statute was made an exhibit to the bill of complaint and appears *in extenso* in the transcript of record. (Transcript pp. 26-44).

The first statutory step in the establishment of a drainage ditch is the filing of a petition. (§2, ch. 134, Laws of 1907; §8459, R. S. 1919, Transcript p 27). This petition must "set forth the necessity for the drainage, "a description of the proposed route by its initial and "terminal points and its general course, or by its exact "course in whole or in part, and a *general statement of "the territory likely to be affected thereby.*" It will be noticed that in the petition, which is the initial and jurisdictional step in the formation of a drainage ditch, it is

not necessary to include a description of the property which will be affected and upon which assessments will be levied to pay the costs of the construction of the ditch. All that is required is a "general statement of the terri- "tory likely to be affected thereby." The next step in the proceeding is for the County Auditor to transmit a copy of the petition to the State Engineer, who, together with the Board of County Commissioners is required to inspect the proposed route and "if in the opinion of the Board "and the State Engineer it is necessary," the Board of County Commissioners causes a survey of the proposed drainage to be made by a competent engineer, selected by the Board, but under the general supervision of the State Engineer. This survey is primarily for the purpose of aiding the Board in determining the necessity for the proposed drainage but it may be a complete survey such as will be required for the construction of the drainage and the assessment of its cost. All this is within the jurisdiction of the Board of County Commissioners. The survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. (§3, ch. 134, Laws of 1907; §1, ch. 102, Laws of 1909; §8460, R. S., 1919, Transcript pp. 27-28). While the survey may, at the option of the Board of County Commissioners, be a complete survey for the purpose of ascertaining all facts required for the construction of the proposed drainage and the assessment of its cost, such complete survey is not rendered obligatory by the statute and the Board of County Commissioners may have made only so much of the survey as may be necessary to determine the necessity for the proposed drainage.

After receiving the report of the surveyor, the Board of County Commissioners is required to determine the "exact line and width of the ditch, if the same shall not "be fixed in the petition, and shall file its determination "with the petition." The Board then fixes the time and place for the hearing of the petition and gives notice by publication in a newspaper for two weeks and by posting

copies of the notice in three public places near the route of the proposed drainage. The notice "shall describe the "route of the proposed drainage and the tract of country "likely to be affected thereby in general terms, the sep- "arate tracts of land through which the proposed drain- "age will pass and give the names of the owners thereof "as appears from the records of the office of the Regis- "ter of Deeds on the date of the filing of the petition, "and shall refer to the files in the proceeding for further "particulars." The notice shall also "summon *all per- "sons affected* by the proposed drainage to appear at "such hearing and show cause why the proposed drain- "age shall not be established and constructed." (§4, ch. 134, Laws of 1907; §2, ch. 102, Laws of 1909; §8461, R. S. 1919, Transcript pp. 28-29). This notice is *the only notice given to property owners prior to the establishment of a drainage ditch and is the only notice under which the Board can acquire jurisdiction to make an assessment.* The owners are named of the separate tracts of land through which the proposed drainage will pass but no description is given of the property *affected by the proposed drainage ditch or which will be assessed for the cost of the construction thereof.* The notice merely describes the route of the proposed drainage and the "tract "of country likely to be affected thereby *in general "terms"* and then summons "*all persons affected by the "proposed drainage*" to appear at the hearing. A notice designating as the tract of country "likely to be affected "thereby in general terms" would be sufficient if it named as such "tract of country" the entire county in which the drainage ditch is to be constructed. Nothing whatever is required in the notice by which any property owner, other than one owning land through which the ditch is to be constructed, is apprised that he is affected or that his land will be assessed for the construction of the proposed drainage ditch. In fact, all that the South Dakota laws requires is for the Board of County Commissioners of a South Dakota county to publish and post a general notice summoning "all persons affected" to appear at the hearing, in order to support an assessment, for the construction of the ditch, upon all of the real property situated within the county limits. There is ab-

solutely nothing in the statutory notice to inform any property owner that he will be called upon to pay an assessment. After the ditch is constructed, the Board of County Commissioners is at liberty, under the South Dakota statute, to extend the assessment to all property in every direction up to the county boundary lines. If this be sufficient notice, then after it is given, the Board of County Commissioners has the power to assess for the cost of the construction of any ditch every acre of property within the county limits.

At the hearing upon the petition, the South Dakota statute kindly permits "any person interested" to appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the Board as to the width and route of the proposed ditch. After the hearing, the County Board may establish the drainage ditch. (§5, ch. 134, Laws of 1907; §3, ch. 102, Laws of 1909; §8462, R. S. 1919. Transcript pp. 29-30).

After the establishment of the drainage ditch, the Board of County Commissioners "shall fix the proportion of "benefits of the proposed drainage among the lands af- "fected and shall appoint a time and place for equaliz- "ing the same." (§6, ch. 134, Laws of 1907; §4, ch. 102, Laws of 1909; §8463, R. S. 1919. Transcript pp. 30-31). There is no statutory requirement as to how soon after the establishment of the drainage ditch this shall be done and it is not necessary that it be done before the drainage project has been completed. It must be done before an assssment is made for the purpose of paying the cost of the construction of the drainage project but the assessment, when made, includes all costs already incurred, or thereafter to be incurred. (§7, ch. 134, Laws of 1907; §5, ch. 102, Laws of 1909; ch. 130, Laws of 1911; §8464, R. S. 1919. Transcript pp. 31-33).

The notice of equalization of proportion of benefits is given by publication once in each week for two consecutive weeks in a newspaper of the county and by posting copies of the notice in three public places near the route of the proposed drainage. The law requires that the "notice shall state the route and the width of the drainage "established, a description of each tract of land affected

"by the proposed drainage and the names of the owners "of the several tracts of land as appears from the rec- "ords of the office of the Register of Deeds, at the date "of filing of the petition, and the proportion of benefits "fixed by each tract of property, taking any particular "tract as a unit, and shall notify all such owners to show "cause why the proportion of benefits shall not be fixed "as stated." (§6, ch. 134, Laws of 1907; §4, ch. 102, Laws of 1909; §8463, R. S. 1919. Transcript pp. 30-31). Here for the first time there is published a description of each tract of land "affected" by the proposed drainage and the names of the owners of such tracts. As in the case at bar, the work may have been completed and an expense of over a quarter of a million dollars incurred before the Board of County Commissioners determines what particular lands are "affected" by the proposed drainage and gives notice to the owners of such lands. A property owner then for the first time notified that his land is "affected" by the proposed drainage has no right to object in any manner to the establishment of the drainage project. He has nothing to say in regard to its manner or cost of construction; he has no voice in the selection of the particular tract of land taken as a unit; and all concerning which he can be heard is as to whether the proportion of benefits "shall not be fixed as stated."

It is now too late for the property owner to escape. He is like a rat in a trap. All that he can do is to appear before the Board of County Commissioners and object to the proportion of benefits which has been assessed against him and ask to have that proportion reduced by raising the proportion of some other property owner. He is precluded from raising any question whatsoever as to the right to include his property within the drainage area. He has nothing to say as to the necessity for the drainage project or as to the manner of construction or its cost. Without any notice, either personal or constructive, his property has been included in the drainage area under the general proclamation of the Board of County Commissioners and he has no redress. The property owner cannot question the validity of the proceedings. All that is left for him to do is to pay.

Our contention is that the South Dakota drainage statute is in violation of the due process of law clause of the fourteenth amendment to the federal constitution for the reason that no opportunity is given a property owner, whose property is "affected" by the proposed drainage project, to appear prior to the doing of the work and the making of the assessment for the construction cost.

In *State of South Dakota v. Risty,* 213 N. W. 952 (p. 959), the Supreme Court of South Dakota attempts to reason away the necessity for giving notice to property owners, whose property will be included within the assessment area, before the assessment area is determined and the work performed, in the following language:

"It is contended by defendants that this notice is suf-
"ficient to comply with the due-process clause of the
"state and federal constitutions. And with this conten-
"tion we agree. At the hearing held pursuant to this
"notice, an interested party may appear and show any
"reason why his property should not be assessed that he
"could have shown at the hearing for determining wheth-
"er the drainage should be established. If his property
"will not be benefited by the establishment of the drain-
"age this may be shown at either hearing, and if shown
"at either hearing his property will not be assessed.

"This precise question has been the subject of much
"litigation in other courts, and it seems to be the con-
"census of opinion that if the property owner is brought
"in and given an opportunity to be heard at any time
"before the apportionment finally becomes a lien against
"his property his constitutional right has not been in-
"vaded."

The fallacy of the reasoning of the South Dakota Supreme Court is evident when the fact is taken into consideration that under the South Dakota drainage statute the Board of County Commissioners is permitted, as was done in the case at bar, to expend more than a quarter of a million of dollars in the construction of drainage works before any notice is given to property owners that

their property will be assessed to defray the cost of the improvement.

An examination of the decisions of this and of other courts will, we believe, disclose the fact that the Supreme Court of South Dakota stands alone in its holding upon this proposition. In every other case in which a board is authorized by law to establish an assessment district and make improvements to be paid for by assessment upon the property within the district, the courts have uniformly held that notice must, in the first instance, be given to the property owners before the assessment area is determined and the construction work entered upon.

The situation in the case at bar is radically different from that in the case of *Spencer v. Merchant*, 125 U. S. 345, and in the line of cases following that decision. In all such cases the legislature created the assessment district and thereby designated what property should be assessed. That the legislature possesses the power to establish an assessment district, the property within which is to be assessed for the making of a special, or local improvement, is well settled.

In the case at bar the legislature of South Dakota did not see fit to establish the assessment district of Drainage Ditch No. 1 and 2, but that assessment area was established by the Board of County Commissioners of Minnehaha county under the provisions of the South Dakota drainage statute, and that statute does not require notice to be given to the property owners before the assessment area is determined and the construction work undertaken.

The distinction between cases in which the assessment district is established by the legislature and those in which it is formed by action of some administrative board was considered by this Court in *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112. In the very elaborate opinion in this case the Court (p. 167) says:

"The legislature not having itself described the dis-
"trict, has not decided that any particular land would
"or could possibly be benefited as described, and, there-
"fore, it would be necessary to give a hearing at some

"time to those interested upon the question of fact wheth-
"er or not the land of any owner which was intended to
"be included would be benefited by the irrigation pro-
"posed. If such a hearing were provided for by the act,
"the decision of the tribunal thereby created would be
"sufficient. Whether it is provided for will be discussed
"when we come to the question of the proper construction
"of the act itself."

Later on in the opinion the Court discusses the question whether the statute under consideration in that case does provide for a hearing prior to the formation of the district and holds, that under the statute the right of hearing is given to the property owner prior to the formation of the district. An examination of the California statute involved discloses the fact that it differs materially from the South Dakota statute in that the petition for the formation of the assessment district must "particu-
"larly describe the proposed boundaries of such dis-
"tricts" and the petition itself must be published. After the petition is published and has been passed upon by the Board of Supervisors, the question of the formation of the irrigation district is submitted to an election of the electors of the district who are also freeholders. (*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, pp. 116-117). These facts differentiate the statute passed upon in *Fallbrook Irrigation District v. Bradley* from the South Dakota statute under consideration. Under the California statute the boundaries of the proposed district are fixed in the first instance and after they have been determined then the question of the formation of the district is put to a vote of the freeholder electors. We submit therefore, that the decision in *Fallbrook Irrigation District v. Bradley* is a distinct authority in favor of our position that the South Dakota drainage statute is unconstitutional. The court expressly determines in that case that notice must be given to the property owner of the formation of the district *before his property can be included in it*, and one of the requisites of notice is that the property owner be advised in some manner, either actually or constructively, that his land will be included within the limits of the proposed project.

Another case in which the distinction is recognized between an assessment district established by the legislature and one established by the action of some administrative board or other authority is *Embree v. Kansas City Road District*, 240 U. S. 242. The Court in the opinion (pp. 246-248) says:

"The district was not established or defined by the legislature, but by an order of the county court made under a general law. Whether there was need for the district and, if so, what lands should be included and what excluded was committed to the judgment and discretion of that court subject to these qualifications: First, that the district should contain at least 640 acres of contiguous land and be wholly within the county; second, that the court's action should be invoked by a petition signed by the owners of a majority of the acres in the proposed district, and, third, that public notice—conceded to be adequate—should be given, by the clerk of the court, of the presentation of the petition and the date when it would be considered, and that owners of land within the proposed district should be accorded an opportunity to appear, either collectively or separately, and oppose its formation. In this connection the statute says: 'The court shall hear such petition and remonstrance, and shall make such change in the boundaries of such proposed district as the public good may require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land within the district as so changed, the court shall make a preliminary order establishing such public road district, and such order shall set out the boundaries of such district as established . . . . but the boundaries of no district shall be so changed as to embrace any land not included in the notice made by the clerk unless the owner thereof shall in writing consent thereto, or shall appear at the hearing and is notified in open court of such fact and given an opportunity to file or join in a remonstrance.' The order actually made shows that four of the present plaintiffs, with three others, appeared in opposition to the petition, recites that 'the court, after hearing and

"considering said petition and said protests and remon-
"strances and all evidence offered in support thereof,
"finds that the public good requires and makes necessary
"the organization, formation and creation of such pro-
"posed public road district . . . . with boundaries as
"stated in said petition,' and sets out the boundaries of
"the district as established.

"The sole purpose in creating the district, as the stat-
"ute shows, was to accomplish the improvement of public
"roads therein—the particular roads to be designated by
"the district commissioners and an approving vote of the
"land owners.

"As the district was not established by the legislature
"but by an exercise of delegated authority, there was no
"legislative decision that its location, boundaries and
"needs were such that the lands therein would be bene-
"fited by its creation and what it was intended to accom-
"plish, and, this being so, it was essential to due process
"of law that the land owners be accorded an opportunity
"to be heard upon the question whether their lands would
"be thus benefited. If the statute provided for such a
"hearing, the decision of the designated tribunal would
"be sufficient, unless made fraudulently or in bad faith.
"*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112,
"174-175.

"Did the statute contemplate such a hearing? We
"have seen that it required that adequate public notice
"be given of the presentation of the petition for the
"creation of the district and the time when it would be
"considered, made provision for the presentation of re-
"monstrances by owners of lands within the proposed
"district, and directed that the petition and remonstrances
"be heard by the county court, that the court make such
"change in the boundaries 'as the public good may re-
"quire' and that the boundaries be not enlarged unless
"the owners of the lands not before included consent in
"writing or appear at the hearing and be given an op-
"portunity to present objections. That a hearing of
"some kind was contemplated is obvious, and conceded."

It will thus be seen that the statute under considera-

tion in *Embree v. Kansas City Road District* differed from the South Dakota drainage statute in that the petition for the formation of the district specified what lands should be included within the boundaries of the proposed district. The South Dakota statute is absolutely wanting in any such requirement.

The case of *Soliah v. Heskin*, 222 U. S. 522, arose under the North Dakota drainage law. An examination of the North Dakota statute, upon which the case arose, discloses the fact that the North Dakota law was not subject to the same objections which are urged against the South Dakota enactment.

Under the North Dakota statute, a petition for the construction of the drain is filed with the board of drain commissioners. This petition designates the starting point and terminus and general course of the proposed drain. The board of drain commissioners then employs surveyors who prepare profiles, plans and specifications of the proposed drain, an estimate of the cost thereof, and a map or plat of the lands to be drained in duplicate, showing the regular sub-divisions thereof, one copy of which is filed in the office of the county auditor in the county in which the drain is proposed to be constructed and the other with the board of drain commissioners, subject to inspection. Upon the filing of the surveyor's report, the board of drain commissioners fixes a date and public place for hearing objections to the petitions and gives notice of such hearing. The notices must contain a copy of the petition and a statement of the date of filing of the surveyor's report and the date when the board will act upon the petition, must be signed by a majority of the members of the drainage board and "shall be sent by "registered mail to the last known address of each and "every *owner of land which may be affected* by the pro-"posed drain." The North Dakota statute therefore requires that the names of "each and every owner of land "which may be affected" be determined and actual notice given these at the very inception of the project and this notice must be given by sending to each owner a copy of the petition and of a statement of the date of filing the surveyor's report and the date upon which the board will

act upon the petition. That is a very different proposition from merely publishing a notice "to all persons whose "property is affected" without first determining who are affected, as required by the South Dakota statute. The opinion in the case of *Soliah v. Heskin* must consequently be read in the light of the North Dakota statute which provides for the giving of notice at two stages of the proceedings to the property owner, first, a notice before the drainage district is formed, and, second, a notice when the assessment of benefits is made. The North Dakota statute provides exactly the thing for the want of which the South Dakota statute is unconstitutional.

The case of *Milheim v. Moffat Tunnel District*, 262 U. S. 710, is clearly to be distinguished from the case at bar. It is a case arising upon an assessment made in a taxing district the limits of which had been fixed by act of the legislature of the state of Colorado, and the Court followed the rule laid down in *Spencer v. Merchant*, 125 U. S. 345, that the legislative authority of the state extends to the formation of taxing districts, and that a state legislature can enact a law fixing the boundaries of a taxing district without giving notice to the owners of property included therein. That is an entirely different proposition from the one arising under the South Dakota drainage law which on its face does not attempt to form a taxing district by legislative enactment. The case of *Voight v. Detroit City*, 184 U. S. 115, is one of a line of cases involving the making of special assessments in cities for various municipal purposes, as is also *St. Louis Land Company v. Kansas City*, 241 U. S. 419. In this line of cases the courts hold that cities organized under general laws or special acts of the legislature may impose special assessments under general statutes authorizing the levying of assessments in proportion to benefits. In all such cases it is held by the courts that some opportunity must be given the taxpayer to be heard as to the proportion of benefits to be assessed against his property, but the property owner is not entitled to a hearing upon a determination of the question whether the improvements are to be made for which the special assessment is levied. That doctrine, however, does not apply to cases in which the

taxing district is not established by legislative enactment but is formed by the action of some administrative board.

The South Dakota drainage statute makes no provision for the giving of notice to the property owners interested prior to the formation of the drainage assessment area and the doing of the drainage construction work, excepting the blanket notice provided by Section 8461, Revised Code, 1919, to "all persons affected." The limits of the proposed drainage assessment area are not determined until after the improvement work has been completed and, until after the work has been completed and the expense thereof incurred, there is no statutory provision whereby any property owner is given notice that his property will be included within the assessment area.

To be sure, the Supreme Court of South Dakota in *State v. Risty*, 213 N. W. 952, holds that at the hearing for the apportionment of benefits had after the construction work has been completed "an interested party may "appear and show any reason why his property should "not be assessed that he could have shown at the hear- "ing for determining whether the drainage should be es- "tablished. If his property will not be benefited by the "establishment of the drainage this may be shown at "either hearing, and if shown at either hearing his prop- "erty will not be assessed." This might be sound law if, under the South Dakota statute, the hearing upon the apportionment of benefits was had prior to the making of the improvement. It is verging upon the absurd to say that the rights of a property owner can be fully preserved by an appearance after the improvement work has been completed. He certainly is deprived of his right to object to the making of the improvement, to the formation of an assessment area, and to the inclusion of his property therein. The only thing that is left to him is to show either that his property is not benefited at all or that it is not benefited to the extent determined by the Board of County Commissioners in the tentative apportionment of benefits. Regardless of the holdings of the Supreme Court of the state of South Dakota in *State v. Risty*, he is absolutely deprived of any right to object to

the making of the improvement or to the inclusion of his property within the assessment area.

In our investigation of this subject we have examined the statutes of many states respecting the formation of drainage districts and the making of improvements and the payment therefor by special assessments. In practically every instance the first step which the statute requires is that the limits of the proposed improvement district be defined, and the next step is to give notice to the property owners interested in the proposed assessment area. It is not until after the area has been definitely determined and notice given that the improvement work is entered upon. After the work is completed then the benefits to the various tracts of property in the assessment area are determined and the assessment to defray the expense of the work is spread.

We are unable to find any statute, other than that of South Dakota, in which the improvement work is entered upon and the expense thereof incurred prior to the determination of the limits of the assessment area, and it is this defect in the statute that renders it, as we contend, unconstitutional in that it operates to take property without due process of law contrary to the fourteenth amendment to the Constitution. We submit that such a statute is in clear violation of the doctrines laid down by this Court in many cases.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112.

Embree v. Kansas City Road District, 240 U. S. 242.

Soliah v. Heskin, 222 U. S. 522.

Central of Georgia Railway Company v. Wright, 207 U. S. 127.

Londoner v. Denver, 210 U. S. 373.

Turner v. Wade, 254 U. S. 64.

Myles Salt Company, Ltd. v. Iberia Drainage District, 239 U. S. 478.

Browning v. Hooper, 269 U. S. 396.

The sole question involved in this case is that of the constitutionality of the South Dakota drainage statute. The Supreme Court of South Dakota in *State v. Risty*, 213 N. W. 952, has labored hard to place a construction upon the statute which would sustain its constitutionality, but the constitutional objections still remain firmly imbedded in it. The statute permits a board of county commissioners to enter upon a drainage project, without limit as to the amount of money which shall be expended upon it and without first determining what property shall be assessed to pay the cost of the work done. A petition is filed asking that certain drainage works be constructed. The petition does not define the limits of the proposed improvement district, nor does it specify in any manner the properties against which the cost of the work is to be assessed. A blanket notice is then published directed to "all persons affected." The Board of County Commissioners then proceeds to construct the drainage works with no limitation whatever as to the character or the extent of the work or the expense. After the work has been done and the money expended, then for the first time the Board of County Commissioners chooses certain properties against which it makes a tentative apportionment of benefits to form a basis for an assessment for the payment of the cost of the construction work. Then for the first time a property owner is notified that he is expected to pay an assessment and his relief is limited to the right to show either that his property is not benefited at all or that it is benefited to a less degree than determined by the Board of County Commissioners.

We contend that due process of law requires that, in the first instance, before the drainage area is determined and before the improvement work is entered upon, the property owner have a right to be heard both as to the making of the improvement and as to the inclusion of his property in the improvement area.

As we have said, the drainage statute of South Dakota is unique and is unlike any other drainage statute in that, in all other statutes, the improvement area is determined before the improvement work is entered upon and an opportunity is given the property owner to be heard upon the

question of the making of the improvement and also upon the question of the inclusion of his property within the assessment area formed to pay for the improvement. As was said by Judge KENYON in *Risty v. Chicago, Rock Island & Pacific Railway Company,* 297 Fed. 710, "the "constitutional questions raised are grave, serious, and "doubtful" and, as was said by Mr. JUSTICE STONE in *Risty v. Chicago, Rock Island & Pacific Railway Company,* 270 U. S. 378, the constitutional questions raised are "questions of substance." These questions are again presented to this Court and in the present case there are involved no questions of the construction of the South Dakota state statutes upon which the decision in this case can turn. The only question involved upon this appeal is as to the constitutionality of the South Dakota drainage statute, and we respectfully submit that this statute is clearly in violation of the due process of law clause of the fourteenth amendment to the Constitution.

II.

THE DRAINAGE STATUTE OF SOUTH DAKOTA IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION SO FAR AS THE SAME APPLIES TO RAILROAD COMPANIES.

In the preceding discussion of the South Dakota drainage law we have considered the subject of the notice required by the statute to be given to property owners in general. It is our contention that the statute is unconstitutional for the reason that it does not provide for the giving of proper notice to property owners before the area of the improvement district is determined and the improvement work entered upon. In the case at bar, the complaining property owners are the Receivers of a railroad company and we make the further contention that, even if the South Dakota drainage statute should be held constitutional so far as ordinary property owners are concerned, it is still so defective as to render it unconstitutional so far as respects railroad companies. We now desire to call the attention of the Court to the provisions (or want of provisions) in the statute relating to notice to be given to railroad companies.

So far as concerns the statutory provisions relating to the notice to be given before a drainage project is entered upon by the Board of County Commissioners under the South Dakota drainage law, there is no difference as respects railroads and other property owners. The only notice, as has been seen, is a general notice to all persons "affected" by the proposed drainage project.

When we come to the matter of the notice given for the equalization of benefits, a singular situation is presented by the provisions of the statute in, that, while the law provides for the publication of a notice to the owners of land, there is no provision whatever for the publication of any notice to railroad companies.

The provisions respecting the notice to be given of the equalization of proportion of benefits is found in Section 8463, South Dakota Revised Code, 1919 (Transcript pp. 30-31). This section was evidently originally drafted for the purpose of providing a method for the equalization of assessments upon agricultural lands. The method, provided by the statute, for arriving at the assessment and equalization of benefits, is to take some "particular tract as a unit" and then with this tract as a measuring stick to determine, in number of units, the benefits received by the remaining tracts of land. This system is one which is in its nature applicable to agricultural lands, but which cannot well be applied to other classes of property, such as railroads and the property of municipalities. In the case of railroads, the taking of a particular tract of land as the unit, or measuring stick, cannot be made to work out successfully unless the taxing authorities are content to assess railroads merely by virtue of the railroad ownership of the tracts of land comprised in the right of way within the assessment area. In other words, the only way in which the proportion of benefits to railroad property could be determined, under the system provided by the statute, would be to consider merely the area of the right of way and proportion benefits to it the same as to the other agricultural land within the assessment area.

Evidently the legislature, in enacting the South Dakota

drainage law, was not satisfied to have railroad companies pay assessments for the construction of drainage works upon the same basis as the owners of agricultural lands, and in enacting Section 8463, South Dakota Revised Code, 1919, after providing the method for the assessment of the proportion of benefits upon lands by selecting some particular tract as a unit, there are added to the Section (something in the nature of an afterthought) the clause, "the proportion of benefits which any county, city, town "or township may obtain by the construction of such "drainage to highways or otherwise, and *the benefits "which any railroad company may obtain for its prop-"erty by such construction, shall* be fixed and equalized "together with the proportion of benefits to tracts of "land." No method of arriving at the assessment and equalization is provided by the statute. The "particular "tract as a unit" system is self-evidently inapplicable in such cases but the legislature has provided nothing to take its place. The law gives the Board of County Commissioners the naked power to fix and equalize the proportion of benefits to counties, cities, towns, townships, and railroad companies, but provides no method upon which the assessment and equalization can be based.

The notice of equalization of proportion of benefits, provided by Section 8463, "shall state the route and "width of the drainage established, a description of each "tract of land affected by the proposed drainage and the "names of the owners of the several tracts of land as "appears from the records of the office of the Register "of Deeds, at the date of the filing of the petition, and "the proportion of benefits fixed for each tract of prop-"erty, taking any particular tract as a unit, and shall "notify all such owners to show cause why the propor-"tion of benefits shall not be fixed as stated." This is a notice directed solely to the owners of tracts of land within the assessment area. It does not purport to be a notice to a railroad company respecting the assessment or the equalization of proportion of benefits upon the property belonging to such organization. The statute authorizes the Board of County Commissioners to assess the "proportion of benefits" which any person, county, city, town or township may obtain by the construction

of drainage. With respect to railroad companies, the statute authorizes the Board of County Commissioners to "fix and equalize" the "benefits," but seems to make a distinction between railroad property and other classes of property by using the words "proportion of benefits" with respect to other property, but the term "benefits" with respect to railroad property. This would seem to indicate that it was not the intent of the legislature that railroad companies should be assessed in the same proportionate manner as are agricultural lands, or as are counties, cities, towns or townships.

The fact, however, remains that the legislature of South Dakota has made no provision whatever for the giving of notice to railroad companies, of the assessment or equalization of benefits supposed to be derived from the construction of drainage works. It consequently follows that as far as railroad companies are concerned, the statute provides for no notice whatever, at any stage of the proceeding, of the apportionment of benefits of the assessment. Even if the South Dakota drainage statute should be held valid as far as respects the matter of notice to the owners of agricultural lands, it is clearly unconstitutional as to railroads and municipalities by reason of its failure to provide for any notice whatever at any stage of the proceedings. It clearly comes within the inhibition of the Fourteenth Amendment and within the doctrine laid down by the Supreme Court in numerous cases.

Central of Georgia Railway Company v. Wright, 207 U. S. 127.

Londoner v. Denver, 210 U. S. 373.

Soliah v. Heskin, 222 U. S. 522.

Turner v. Wade, 254 U. S. 64.

Road Improvement District v. Missouri Pacific Railroad Co., 274 U. S. 188.

It will be observed in passing that the provisions of the South Dakota drainage statute with respect to the apportionment of benefits to railroad companies and the making of assessments upon such companies is in no manner

involved in the decision of the Supreme Court of South Dakota in *State v. Risty,* 213 N. W. 952, and this Court is consequently in no manner bound by any holding upon the subject of the Supreme Court of South Dakota.

The South Dakota drainage statute having failed to provide for the giving of any notice at any stage of the proceedings prior to the time the tax became absolute to railroad companies, any assessment or tax imposed upon such corporations under the statute is without due process of law and void. The statute is also defective in that, while it provides for the determination by the Board of County Commissioners of the "proportion of benefits" which any private property owner, or any county, city, town or township, may obtain by the construction of the drainage, it is required to ascertain "the benefits" which any railroad company may obtain for its property by such construct, and such benefits "shall be fixed and equalized together with the proportion of benefits to tracts of land." In other words, railroads are singled out as a class by themselves and the absolute benefits determined by the Board of County Commissioners without regard to their proportionate relationship to the benefits conferred upon other property owners. The assessments upon railroad companies are consequently fixed upon the flat benefits received by them without regard to the ratio which they may bear to the benefits received by other classes of property.

III.

THE SOUTH DAKOTA DRAINAGE STATUTE IS UNCONSTITUTIONAL AS RESPECTS RAILROADS FOR THE REASON THAT IT PROVIDES NO NOTICE OF HEARING OR RIGHT OF HEARING EVEN UPON THE QUESTION OF THE APPORTIONMENT OR EQUALIZATION OF BENEFITS.

In this connection we ask the Court to carefully consider and analyze §8463 of the Revised Code of 1919, (Transcript pp. 30-31), hereinbefore quoted. It requires the county commissioners to proceed as follows:

(a) After the establishment of the drainage and fixing of damages, to "fix the proportion of benefits of the proposed drainage *among the lands affected,* and to appoint a time and place for equalizing the same;"

(b) To give notice of such proportion of benefits and equalization of benefits by publication and posting;

(c) To state in the notice the route and width of the drainage, "a description *of each tract of land affected,*" and the names of the owners of the "several tracts of land," and the proportion of benefits "*for each tract of property,*" and to notify "all such owners" to show cause why the proportion of benefits shall not be fixed.

The foregoing is all that this section requires the county commissioners to do with reference to the question of equalization of benefits prior to the hearing, and with reference to notice.

The section then further provides that upon the hearing, without any provision whatever for notice, the benefits (not the proportion of benefit) "which any railroad company may obtain for its property by such construction" and the proportion of benefits which any county, city, town or township may so obtain "shall be fixed and "equalized *together with the proportion of benefits to "tracts of land.*"

It will be observed that notice is required to be given only to the owners of the "several tracts of land." This is so plain as to scarcely admit of argument. That the right of way, embankments, bridges, and other property (not agricultural land) of railroad companies were not deemed to have been included within the term "tract of land" or "tract of property" is clearly evidenced by the fact that the legislature found it necessary to make and made in the latter part of §8463 special provision for ascertaining "the benefits which any railroad company "may obtain for its property by such construction," and for equalizing the same "together with the *proportion of "benefits to tracts of land.*" This provision is entirely superfluous if such property should be held to be included within the meaning of "a tract of land" as such term is used in the preceding portion of the statute pro-

viding for the fixing of proportion of benefits and giving of notice and in fact is inconsistent with such interpretation.

When the South Dakota drainage statute is critically examined, it is evident that it purports to authorize the Board of County Commissioners to determine the benefits to railroads and to assess the same without any notice and without the giving of any opportunity to be heard.

IV

THE STATUTE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IN THAT IT PROVIDES FOR AND REQUIRES ASSESSMENT FOR THE ENTIRE COST OF DRAINAGE WITHOUT REGARD TO THE RELATION OF BENEFIT TO COST.

The statute does not of itself fix or establish drainage districts or in any manner fix or define the boundaries of any area to be assessed for the cost of a drainage project. It provides no proper method for the organization of a drainage district. It does not provide for any determination that the cost of drainage will not exceed the benefit to be derived. It does not afford property owners the right to be heard, at any time or place, before any tribunal, upon the question as to whether or not such cost will exceed the benefit, nor with reference to the amount and validity of the tax to be assessed against their property.

The statute does not create taxing districts and provide that the property in such districts shall be assessed for the cost of the benefit of drainage projects constructed within their boundaries. If it did, unless it were so arbitrary as to render it vulnerable to attack upon constitutional grounds, we would concede that such legislative determination would be conclusive upon the question of the relation of benefit to cost and that upon such question property owners would have no right to be heard. The rule, however, is different when such determination is delegated by the legislature to a subordinate body. In that event property owners are entitled to notice and hearing upon that question.

Spencer v. Merchant, 125 U. S. 345.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112.

Road Improvement District No. 2 v. Missouri Pacific Railroad Co., 275 Fed. 600.

It is only when there has been legislative determination as to benefits, in which the determination that the benefits equal or exceed the cost is necessarily involved, that the property owners' right to be heard is limited to the question as to the proportional amount and validity of his tax. In all cases where the authority to determine such questions is delegated by the legislature to another body jurisdiction cannot attach in such subordinate body unless the property owner, by requirement of the delegating statute, is given notice of and an opportunity to be heard upon the question of whether or not his property is or may be benefited by the improvement to an extent equal to or exceeding the cost thereof. A statute without such a provision fails to afford due process of law and is void.

It is apparent that the South Dakota legislature has attempted to vest in the County Commissioners the power to establish and construct a system of drainage without first doing any of the following things: creating and defining the boundaries of a drainage district; determining the approximate probable cost of the work, or determining that the benefit to the property to be included within the district and assessed for the cost of the work, will equal or exceed such cost. The only finding the commissioners are required to make before proceeding with the work is that "the drainage proposed or any variation thereof is "conducive to the public health, convenience "or welfare, or necessary or practicable for draining ag- "ricultural lands." (§8462 R. C. 1919, Transcript pp. 29-30). On such determination alone they are authorized to proceed, without limit as to cost, and fully complete the work, without any notice whatever to property owners or any right given to owners to be heard at any stage of the proceedings thereafter until the hearing provided for by §8463, R. C. 1919 (Transcript pp 30-31), upon the

equalization of benefits. There is no requirement that railway companies be given notice even of this hearing.

At the hearing upon the equalization of benefits, nothing is determined except the proportion that the benefit to each tract of property affected bears to the benefit to the tract selected as a unit. The cost of the work and the amount of the assessment is not and cannot be involved. The cost per unit may be many times the benefit per unit but that is not relevant to any issue determined at the equalization hearing. Upon that question there is no hearing at any stage of the drainage proceedings. After the determination of the proportion of benefits, the assessment of the entire cost is made without notice, without hearing, and in the proportions fixed in the resolution equalizing the benefits.

The statute lacks the fundamental prerequisite necessary to the validity of a special assessment for benefits, to-wit: the determination, or proper provision requiring the determination, that the benefits will equal the cost. *Village of Norwood v. Baker,* 176 U. S. 269.

It has been contended that it was the legislative intent that the commissioners in determining whether or not proposed drainage would be "practicable" should base such determination in part upon the relation of cost to benefit. This is not tenable because §8460 R. C. 1919, authorizes them to act upon a preliminary survey made merely for the purpose of aiding the Board in determining the necessity of the proposed drainage, leaving it discretionary with them as to whether or not "a complete "survey such as will be required for the construction of "the proposed drainage and *assessment of its cost" shall be made.* (Italics are ours).

The particular question under discussion was considered by this Court in *Martin v. District of Columbia,* 205 U. S. 135. The statute under consideration required a jury to apportion the cost of a local improvement "according as "each lot or part of land in such square may be benefited "by the opening, widening, extending, or straightening of "such alley." The Court sustained the constitutionality of the act but sustained it only because it permitted, as stated by the Court, "the interpretation that in any event,

"the apportionment is to be limited to the benefit and if "if is so limited all serious doubt as to the validity of "the statute disappears." The Court further said:

"We think it apparent, as was assumed by the Court "of Appeals, that the jury understood their duty to be "to divide the whole cost among the landowners whether "the benefit was equal to their share of the cost or not. "It must be admitted that the language of the statute "more or less lent itself to that understanding. * * * "For this reason, the assessment must be quashed."

The language of the South Dakota statute is quite different. §8462 R. C. 1919 provides that "after the equal- "ization of the proportion of benefits the board may make "an assessment against each tract or property affected "*in proportion to the benefits as equalized* for the pur- "pose of paying the damages and the cost of establish- "ment."

This language admits of but one interpretation when it is considered in connection with the provisions of Code Section 8463. It clearly requires the County Commissioners to first determine the proportion of actual benefits and then to assess the entire cost in such proportion. The question of whether or not the cost exceeds the benefit is never determined and has no effect whatever upon the assessment under the South Dakota statute.

V.

IN CONCLUSION.

When this litigation was before the Court at the October Term, 1925, in the case of *Risty v. Chicago, Rock Island & Pacific Railway Company* and the five other cases reported in 270 U. S. 378, the constitutional questions involved in the case at bar were also presented to the Court. There were involved in those cases other questions arising under the construction of the various sections of the South Dakota drainage statute, and the Court declined to pass upon the constitutional questions and decided the cases upon the questions of statutory construction. *Risty v. Chicago, Rock Island & Pacific Railway Company,* 270 U. S. 378. Subsequently the Su-

preme Court of South Dakota saw fit to overrule the holdings of this Court as to the effect to be given to the South Dakota statute. *State v. Risty*, 213 N. W. 952. This rendered it necessary that the constitutional questions be again presented for determination by this Court and that has been done in the case at bar. In this case no question of statutory construction is presented and the sole grounds upon which the decision of this Court is sought are those relating to the constitutionality of the South Dakota drainage statute under the provisions of the federal Constitution. Many cases have been presented to the courts involving the validity of statutes relating to drainage and other public improvements, the cost of which is defrayed by special assessments upon the properties benefited, but we venture to say that in no reported case has there been involved the questions now presented in this case upon the South Dakota drainage statute. Even in the light of the forced construction given the statute by the South Dakota Supreme Court, we earnestly contend that the South Dakota statute does not comply with the provisions of the Fourteenth Amendment prohibiting the taking of property without due process of law.

For the foregoing reasons we respectfully submit that the order appealed from should be reversed and this case remanded to the District Court with instructions to issue the interlocutory injunction as prayed in the bill of complaint.

Respectfully Submitted,
C. O. BAILEY and
H. E. JUDGE,
Solicitors for Appellants.

H. H. FIELD,
O. W. DYNES,
H. H. TRIESTAL,
R. L. KENNEDY,
H. O. HEPPERLE,
T. L. FULLER,
J. H. VOORHEES,
T. M. BAILEY
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 501

H. E. BYRAM, et al., Receivers of C. M. & St. P. Ry. Co.,

Plaintiffs and Appellants,

VS.

A. G. RISTY, et al., as County Commissioners of Minnehaha County, et al.,

Defendants and Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF AND ARGUMENT FOR APPELLEES.

SUBJECT INDEX

	Page
Jurisdictional Grounds	1
Statement of the Case	2
Resume	8
Brief and Argument	9

INDEX — (Continued)

Page

Preliminary Questions:

I. Appellants by Failure to protest invalidity of statute before Board are Estopped and Barred from now urging unconstitutionality ---------- 10

Waiver not a Federal Question ---------- 19

II. Question of Constitutionality of Drainage Law now Res Adjudicata ---------- 22

Court's Opinion Law of Case ---------- 23

III. Appellant having admitted its just proportion of Cost of Drainage Ditch No. 2, is now Estopped from Questioning Constitutionality of Law on assessment for Maintenance and Repair of same drainage ---------- 29

Constitutional Questions:

I. Notice and Hearing before organization of District not Constitutionally required ---------- 37
but provided by statute ---------- 46

Criticism of Statute presents no Constitutional Question -- 51

Statute permits all necessary adjustments ---------- 52

Appellant's Cases Distinguished ---------- 55

II & III. Drainage Law Provides for Proper Notice and Hearing to Railroad Companies, and provides for Proportionate Assessment against Railroad Companies ---------- 60

IV. Statute Does Not Require Assessment for Cost Without Regard to Relation of Benefit to Cost ---------- 79

Conclusion ---------- 88

Appendix A (State Constitution) ---------- 90

Appendix B (State Statutes) ---------- 91

Drainage Law, Record pages 26-44.

TABLE OF CASES CITED

Page

A

Aspden vs. Nixon, 4 How. 464 ---- 24
Ayres vs. Cone, (C. C. A.), 138 Fed. 778 ---- 24

B

Bagley Elevator Co. vs. Butler, 24 S. D. 429 ---- 13
Baker vs. Cummings, 181 U. S. 117 ---- 24
Bauman vs. Ross, 167 U. S. 548 ---- 51
Bemis vs. Guirl, (Ind. 1914), 105 N. E. 496 ---- 44
Bonds of Madeira Irr. Dist., in re: (Cal. 1891), 28 Pac. 273 ---- 43
Bowles vs. Outing Co., 175 U. S. 262 ---- 26
Brumfield vs. State, (Miss.) 59 So. 921 ---- 45

C

Cleary vs. Ellis Foundry Co., 132 U. S. 612 ---- 26
Cooper Mfg. Co. vs. Ferguson, 113 U. S. 727 ---- 87
Corcoran vs. Canal Co., 94 U. S. 741 ---- 23
Corliss vs. Richford, (Vt. 1911), 81 A. 234 ---- 45
Chi., R. I. & Pac. Ry. Co. vs. Risty,
270 U. S. 378 ---- 23, 31
297 Fed. 710 ---- 31
282 Fed. 362 ---- 22, 30, 50
Chi., R. I. & Pac. Ry. Co. vs. Schendel, 270 U. S. 611 ---- 31
Cromwell vs. Sac Co., 94 U. S. 351 ---- 24
Curtiss vs. Pound, 34 S. D. 628 ---- 19, 72

D

D'Arcy vs. Hartford Co., (C. C. A.) 161 Fed. 733 ---- 24
Davidson vs. New Orleans, 96 U. S. 97 ---- 45, 51
Dealy vs. United States, 152 U. S. 539 ---- 86
Drainage Ditch No. 12, in re. 44 S. D. 158 ---- 16, 47, 82
Dunn vs. Fort Bend Co., 17 Fed. (2d) 329 ---- 32, 35, 79

E

Edward Hines Yellow Pine Trustees vs. Martin, 268 U. S. 458 ---- 88
Electric Co. vs. Dow. 166 U. S. 489 ---- 32
Embree vs. Kansas City Road Dist., 240 U. S. 242 ---- 55
Erickson vs. Cass Co., (N. D. 1902), 92 N. W. 841 ---- 44, 57
Eustis vs. Bowles, 150 U. S. 361 ---- 19, 32, 33
Everington vs. Board, (Minn. 1912), 138 N. W. 426 ---- 52

F

Fallbrook Irr. Dist. vs. Bradley, 164 U. S. 112 ---- 49, 51, 55
Farncomb vs. Denver, 252 U. S. 7 ---- 11, 12, 16

TABLE OF CASES — (Continued)

Page

First Nat. Bank vs. Comm. of Weld Co., 264 U. S. 450 11
Foundry & Pipe Works vs. Oconto Water Co., 183 U. S. 216 .. 24

G

Gaar Scott Co. vs. Shannon, 223 U. S. 468 19
Gilseth vs. Risty, 46 S. D. 374 14
Goodrich vs. Detroit, 184 U. S. 432 42
Gorham Mfg. Co. vs. State Tax. Comm., 266 U. S. 265 ..... 11, 12
Great Falls Mfg. Co. vs. Garland, 124 U. S. 581 32
Guaranty Co. vs. Phoenix Ins. Co., 124 Fed. 170 27

H

Haggart vs. Alton, 29 S. D. 509 ..... 14, 45
Hale vs. Lewis, 181 U. S. 473 19
Hawaii vs. Mankachi, 190 U. S. 197 77
Hennessy vs. Douglas Co., (Wis. 1898). 74 N. W. 983 52
Hickey vs. Johnson, (C. C. A.), 9 Fed. (2d) 498 ..... 24, 31

J

Johnson vs. Lewis, (Ind. 1888), 18 N. E. 7 45
Johnson vs. Peterson, 288 Fed. 735 50

K

K. C. So. Ry. Co. vs. Levee Dist., (C. C. A.), 15 Fed (2d) 637 11
Kansas City vs. Duncan, (Mo.) 37 S. W. 513 52
Keokuk vs. Salm, 258 U. S. 122 62

L

Lamb vs. Connelly, (N. Y. 1880), 25 N. E. 1042 52
Land Co. vs. Kansas City, 241 U. S. 419 41
Lent vs. Tillson, 72 Cal. 404 52
Londoner vs. Denver, 210 U. S. 373 41

M

Maria Martin, in re The, 12 Wall. 31 25
McGregor vs. Hogan, 262 U. S. 234 11
McRae, in re, (Minn. 1904), 100 N. W. 384 ..... 45, 52
Milheim vs. Moffit Tunnel, 262 U. S. 710 ..... 11, 12, 16
Milne vs. McKinnon, 32 S. D. 627 ..... 16, 18, 53, 72
Mining Co. vs. Mining Co., 157 U. S. 683 24
Mitchell vs. First National Bank, 180 U. S. 481 24
Muscatine Light Co. vs. Muscatine, 256 Fed. 933 ..... 32, 33

N

New Orleans vs. Citizens Bank, 167 U. S. 371 24

TABLE OF CASES — (Continued)

Page

O

Oklahoma vs. Texas, 256 U. S. 70 ---- 24

P

Packet Co. vs. Sickels, 5 Wall. 580 ---- 24
Paulsen vs. Portland, 149 U. S. 30 ---- 45, 49, 51
People vs. Brooklyn, 4 N. Y. 419 ---- 52
Peoria etc. R. Co. vs. United States, 263 U. S. 528 ---- 28
Pierce vs. Somerset Ry., 171 U. S. 642 ---- 19, 32
Pierce Oil Corp. vs. Phoenix Refining Co., 259 U. S. 125 ---- 32, 33
Pullman Co. vs. Kansas, 216 U. S. 56 ---- 32, 34

R

Renville State Bank vs. Kingsburg, 40 S. D. 191 ---- 61
Revised Code, N. D. 1905—
Sec. 1818-1850 ---- 57
Sec. 1821 ---- 57, 58
Sec. 1825 ---- 58
Sec. 1828 ---- 58
Revised Code, S. D. 1919—
Sec. 6606 ---- 62, 65
Sec. 6662 ---- 63, 64
Sec. 6663 ---- 63, 65
Sec. 6664 ---- 63
Sec. 8458-8491 ---- 69
Sec. 8459 ---- 38, 39, 46
Sec. 8461 ---- 10, 11, 14, 46, 47, 53
Sec. 8462 ---- 14, 17, 39, 47, 48, 49
Sec. 8463 ---- 10, 11, 15, 18, 46, 52, 55, 68, 69, 70, 75, 76, 82, 87
Sec. 8464 ---- 34, 60, 61, 64, 65, 66, 69, 75, 87
Sec. 8467 ---- 34
Sec. 8469 ---- 16
Sec. 8470 ---- 23, 34
Risty vs. C. M. & St. Paul Ry. Co., 282 Fed. 364 and 270 U. S. 378 ---- 8
Roberts vs. Smith, (Mich. 1897), 72 N. W. 1091 ---- 42
Robt. Noble Estate vs. Boise City, 19 Fed. (2d) 927 ---- 11
Ross vs. Board, (Ia. 1905), 104 N. W. 506 ---- 42, 80
Russell vs. Places, 94 U. S. 606 ---- 24

TABLE OF CASES — (Continued)

Page

S

Sanborn Co. vs. Estabrook, 49 S. D. 360 ---------- 11, 16
Seneca Nation vs. Christy, 162 U. S. 283 ---------- 19
Session Laws, S. D. 1905
Chap. 98 ---------- 69
Session Laws, S. D. 1907
Chap. 134, Sec. 6 ---------- 17, 69, 70
Chap. 134, Sec. 7 ---------- 69
Session Laws, S. D. 1909
Chap. 102, Sec. 7 ---------- 69, 70
Sessions Laws, S. D. 1911
Chap. 130 ---------- 69
Shepard vs. Barron, 194 U. S. 553 ---------- 10
Sioux Falls Savings Bank vs. Minnehaha Co., 29 S. D. 146 ---- 13
Soliah vs. Heskin, 222 U. S. 522 ---------- 40, 56, 81
Soliah vs. Cormack, (N. D. 1908), 117 N. W. 125 ---------- 56
So. Pac. Ry. Co. vs. United States, 168 U. S. 1 ---------- 24
Spencer vs. Merchant, 125 U. S. 345 ---------- 42, 81
Standard Stock Food Co. vs. Wright, 225 U. S. 540 ---------- 82
State vs. Burns, (Minn. 1914), 145 N. W. 377 ---------- 45
State vs. Cunningham, (Wis. 1892), 53 N. W. 35 ---------- 86
State vs. Pound, 34 S. D. 628 ---------- 16
State vs. Redwood Co., (Minn. 1889), 42 N. W. 473 ---------- 43
State vs. Risty, (S. D. 1927), 213 N. W. 952 ---------- 11, 16, 20, 39, 47, 50, 51, 54, 72, 82
Stearns vs. Lawrence, (C. C. A.), 83 Fed. 738 ---------- 24
Swager vs. Smith, (C. C. A.), 194 Fed. 762 ---------- 28

T

Turkey Valley Drainage Dieth, In re, (S. D. 1927), 212 N. W. 48 14

U

Union Pacific Ry. Co. vs. Board of Weld Co., 217 Fed. 540 --- 11, 12
Union Pacific Ry. Co. vs. Ryan, 113 U. S. 516 ---------- 62
United States vs. Katz, 271 U. S. 354 ---------- 78
United States vs. Moser, 266 U. S. 236 ---------- 24, 31

V

Voight vs. Detroit, 184 U. S. 115 ---------- 42, 80--

W

Wall vs. Parrott Silver & Copper Co., 244 U. S. 407 ---------- 32

TABLE OF CASES — (Continued)

	Page
Websters Dictionary	86
Wood Bros. vs. Yankton Co., 21 Fed. (2d) 267	61
Words & Phrases, Vol. 8, P. 3992	68, 73
Wright vs. Davidson, 181 U. S. 371	51
Wurtz vs. Hoagland, 114 U. S. 606	45

OPINIONS OF FEDERAL AND STATE COURTS CONCERNING THIS PROJECT

Chicago, Rock Island & Pacific Railway Company vs. Risty, 282 Fed. 364.

Risty vs. Chicago, Rock Island & Pacific Railway Company, 297 Fed. 710; 270 U. S. 378.

Risty vs. Chicago, Milwaukee & St. Paul Railway Company, 266 U. S. 622; 270 U. S. 378.

No opinion was filed by the District Court in its determination of this case.

State of South Dakota vs. Risty, (S. D. 1927), 213 N. W. 952.

Gilseth vs. Risty, et al, 46 S. D. 374.

Milne vs. McKinnon, 32 S. D. 627.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 501

H. E. BYRAM, et al., Receivers of
C. M. & St. P. Ry. Co.,
Plaintiffs and Appellants,

vs.

A. G. RISTY, et al., as County Commissioners of Minnehaha County, et al.,
Defendants and Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF AND ARGUMENT FOR APPELLEES

JURISDICTIONAL GROUNDS INVOKED.

Order and judgment herein denying an application by the plaintiffs and appellants for an interlocutory injunction against the defendants and appellees was made by Judges William F. Booth, George C. Scott and James D. Elliott, on July 12, 1927. (R. 132-133).

The plaintiffs and appellants claim that the South Dakota Drainage Law, being Sections 8458-8491 inclusive, Revised Code of South Dakota, 1919, and amendments thereto, is void and in violation of the Fourteenth Amendment to the Federal Constitution for the reasons that said law provides no fixed and determinable method for the apportionment of benefits; furnishes no fixed nor determinable basis for such apportionment of benefits upon the property of railroad companies or other corporations; provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner; fails to require a notice to the property owner before a drainage assessment area is established or work constructed; and the claim is made that the tentative apportionment made, shown by Exhibit "C" (R. 46-90), is wholly speculative, arbitrary, unjust, illegal and discriminatory and without any reasonable or rational basis, and that the same is not in proportion to any benefit which the property of appellant has ever received or ever can receive, and that appellants' property has not been and never can be benefited by the work performed to the extent claimed or to any extent whatever, and that the claimed apportionment is out of all proportion to the apportionment sought to be placed upon agricultural lands in the vicinity. (R. 22-23).

The appeal to this Court is taken under the provisions of 36 Stat. 557 and amendments thereto, being Sec. 266 of the Judicial Code.

STATEMENT OF THE CASE.

The territory contained in and affected by these drainage proceedings consists of property within

the city limits of the City of Sioux Falls and a small strip of territory south of said city and adjacent to the Big Sioux River as it flows around said city, also territory west of the city limits of Sioux Falls and a strip of territory, approximately three miles wide extending north of the City of Sioux Falls in the valley of the Big Sioux River and in the vicinity of the river a distance of approximately fifteen miles.

The outlet to these ditches is in the Big Sioux River in the city limits of Sioux Falls, east and just south of the state penitentiary.

About July 1, 1907, a petition was filed with the appellee Board for the construction of a drainage ditch with its initial point about three miles north of Sioux Falls and its terminal point in the Big Sioux River as above indicated. Such proceedings were had upon this petition that there was established a drainage ditch known as "Drainage Ditch No. 1," which was thereafter constructed, completed and paid for by special assessments upon property benefited thereby.

During the construction of this drainage ditch, and in the month of January, 1909, other petitions were filed asking for the enlargement of this ditch project by extending the same several miles north and emptying this enlarged ditch through the terminal point of Drainage Ditch No. 1, which petitions were heard upon notice and the appellee Board determined that said petitions should be granted enlarging said Drainage Ditch, and which enlarged project was designated "Drainage Ditch No. 2," (R. 4, 5, 106, 120, 121), and cost approximately $81,000.00. (R. 126).

In October, 1910, the appellee Board fixed the apportionment of benefits for Drainage Ditch No. 2 (R. 120), and gave notice as required by law of the equalization of the same, which notice named the appellant Railway Company and described the property benefited, and apportioned the number of units as set forth in Paragraph 20 of plaintiff's bill of complaint (R. 16-17); and on November 4, 1910, entered an order equalizing and fixing the proportion of benefits against appellant's said property, from which order said appellant Railway Company appealed to the Circuit Court of Minnehaha County, South Dakota, and thereafter removed said cause to the United States District Court for the District of South Dakota, Southern Division (R. 127, 128), and thereafter the parties hereto, the said appellant Railway Company and the appellees herein, entered into and filed and presented to said United States District Court their signed stipulation (R. 127, 128, 129), wherein they agreed that judgment be entered in said removed cause "fixing the equalized proportion of benefits chargeable to the appellant (Chicago, Milwaukee & St. Paul Railway Company) for benefits to its said right of way in said matter in the number of units that will, when the final assessment is made in said drainage ditch proceedings, produce the sum of $8,500.00, and that the said money assessment so made shall be entered against said Railway Company in the sum of $8,500.00"; and pursuant to said stipulation and on January 15, 1912, a judgment (R. 129-130) was duly and regularly entered in said Court adjudging that the equalized proportion of benefits, made by the appellee Board on November 4, 1910, be and the same was modified by reducing the number of units as-

sessed against the appellant Railway Company from 257 units to the number of units that would, when the final assessment was made in said drainage proceedings, produce the sum of $8,500.00, and thereafter pursuant to said judgment the appellee Board made an assessment against the appellant Railway Company in said sum of $8,500.00 and which sum was on April 8, 1912, paid by the appellant. (R. 131). The property described in the said stipulation, judgment and receipt (R. 127-131) is all described in the new apportionment notice, Exhibit "C". (R. 12, 13, 89).

In the spring of 1916, flood waters washed out the concrete trough built to conduct the ditch waters down the bluff, near the state penitentiary, into the Sioux River below the bluff, and washed out a natural barrier between the river and a short lateral ditch about two miles north of the City of Sioux Falls, permitting the river to flow unobstructedly into this lateral ditch, thence into the lower end of Drainage Ditch No. 2 and down the bluff near the penitentiary, washing the same away. (R. 108).

After the Board had taken steps to dam up the ditch to prevent the water running wild (R. 109), a petition was presented to the Board by proper parties, asking for the establishment of what was known as the Covell Lake cut-off (R. 110), and the abandonment of the old outlet, being about one mile of the lower end of Ditch No. 2, upon which petition, after notice, a hearing was had and the prayer of the petition was granted. (R. 11).

Nothing further was done upon the Covell Lake cut-off and outlet, but about August 3, 1916, a petition was filed with the Board, signed by the City

of Sioux Falls, F. L. Blackman and others, asking for the enlargement of Drainage Ditch No. 1 and Drainage Ditch No. 2. (R. 111). Upon notice given according to law, a hearing was had and, no one objecting, the prayer of the petition allowed (R. 112-113) establishing the enlarged drainage over the exact line and right of way of the old ditches. After hearing upon damages, construction work was started and the old ditch cleaned out, enlarged, diked, river canalized, and other improvements made.

On June 10, 1921, the Board fixed a new tentative apportionment of benefits to the property affected by the enlarged project and fixed August 1, 1921, at the office of the County Auditor as the time and place for hearing upon the equalization of the tentative apportionment of benefits (R. 46-90 inclusive). Appellants failed and refused to appear or file written protests or any protests at the time and place fixed, or at all, against the apportionment made against its properties because of alleged unconstitutionality of the law or for any other reason. (R. 14, 21, 121).

Instead of presenting objections before the Board on August 1, 1921, as required, and about July 25, 1921, and prior to the hearing on said equalization of said apportionment of benefits, appellant Railway Company filed its bill in equity in the United States District Court for the District of South Dakota, asking the same relief, in practically the same language, as is requested in this action (R. 22, 23, 102, 103), viz: a perpetual injunction against the defendants and appellees herein (R. 14) enjoining and restraining them from making any assessment of any kind upon any of the property of said appel-

lant, upon the ground that the drainage law of South Dakota was void and in violation of the Fourteenth Amendment to the Constitution of the United States (R. 102-103), being the same identical grounds as alleged and claimed in the present action. (R. 22-23).

A trial of the issues made in the United States District Court for the District of South Dakota was had, and about March 2, 1922, that Court decided that the drainage law of South Dakota was not in violation of the Federal Constitution, but that the work done constituted merely maintenance and repair of old Drainage Ditch No. 2 and did not constitute the establishment and construction of an enlarged project, and therefore, because the assessment undertaken was not made upon the basis of maintenance and repair work (R. C. Sec. 8470), but upon the theory that said project was an enlarged or new project, the trial court thereupon enjoined the defendants and appellees from making any assessment for benefits to any property of the appellant outside of the original assessment area of Drainage Ditch No. 2 (R. 90-94 inclusive); the court's opinion in this case being reported in 282 Fed. 364.

Thereafter an appeal was taken by the appellee Board to the Circuit Court of Appeals of the United States for the Eighth Circuit by the above named appellees, but appellant Railway Company took no appeal from the decision of the District Court holding the drainage law constitutional; which last named court affirmed the decree of the United States District Court, and the opinion thereof is reported in 297 Fed. 710.

Thereafter an appeal was taken by the appellee Board to the Supreme Court of the United States from the decree of the United States Circuit Court of Appeals for the Eighth Circuit, and upon hearing, the Supreme Court, on March 1, 1926, affirmed the decree of the Circuit Court of Appeals, the opinion in which case is reported in 270 U. S. 378.

RESUME.

1. Appellant, under the drainage law, had the right and opportunity, after notice given, to be heard before the Board of County Commissioners, a statutory tribunal, on August 1, 1921, as to the validity of these drainage proceedings, and it failed and refused to appear before the Board and so object to the validity or legality of the proceedings or of the apportionment tentatively made against it.

2. In a trial had in the U. S. District Court for the District of South Dakota in January, 1922, between these same parties upon the same issues as here tendered, the trial court held that the South Dakota drainage law was constitutional, appellant herein obtaining only a part of the relief prayed for, and thereafter appellant took no appeal from said decision; which holding of the trial court was affirmed upon appeal to this Court. (270 U. S. 378).

3. In the case of *Risty vs. C. M. & St. P. Ry. Co.*, 282 Fed. 364, which was finally appealed to this Court and reported in 270 U. S. 378, each of the Federal Courts ruled and decided, as to the appellant herein, that under the South Dakota drainage law the work undertaken in 1916 on the project now in controversy constituted maintenance and repair

work on old Drainage Ditch No. 2, and did not constitute the establishment of a new or enlarged drainage project, and that by reason of said finding and determination the apportionment and prospective assessment was upon an improper basis and could not be sustained because not made as provided by law upon the apportionment previously made for Drainage Ditch No. 2. Upon apportionment being made for Drainage Ditch No. 2, in 1910, notice and hearing was had upon the equalization thereof, and from the order finally equalizing the same the appellant herein perfected an appeal to the state Circuit Court and then removed the cause to the U. S. District Court where, upon stipulation of parties hereto, judgment was entered decreeing that appellant's property was benefited by the construction of said ditch to the extent of $8,500.00 out of a total cost of construction of $81,106.00, or equal to 10.48% of the total cost of the construction of said ditch; and subsequent proceedings were had by the appellee Board correcting its original apportionment and equalization to coincide with the judgment of the U. S. District Court, and thereafter appellants herein paid their proportionate share of said cost in accordance with said judgment, namely, $8,500.00.

The foregoing being the facts in this suit, we submit on behalf of the appellees the following:

BRIEF AND ARGUMENT.

PRELIMINARY QUESTIONS.

Before taking up the question of the constitutionality of the drainage law claimed to be presented to this Court by appellants herein, appellees feel there

are preliminary questions to be determined by the Court which will make it unnecessary to consider the constitutional question. As was said by this Court in the case of *Shepard vs. Barron,* 194 U. S. 553, 565:

> "Before coming to the consideration of the validity of these objections to the statute (constitutional question) the defendant insists that by virtue of the facts already detailed in the foregoing statement, the plaintiffs are not in a position to raise the question."

We have hereinbefore presented the concrete conditions which constitute appellees' objections to the consideration by this court of any constitutional question, and will discuss them in the order above set forth.

I.

APPELLANTS, BY THEIR FAILURE TO PROTEST THE INVALIDITY OF THE DRAINAGE STATUTE OF SOUTH DAKOTA BEFORE THE STATUTORY TRIBUNAL (BOARD OF COUNTY COMMISSIONERS), ARE ESTOPPED AND BARRED FROM NOW URGING THE UNCONSTITUTIONALITY OF THE DRAINAGE LAW.

Appellants, under the drainage law of South Dakota (R. C. 8461, 8463), were given an opportunity, after notice given, to be heard before the Board of County Commissioners, a statutory tribunal empowered to pass upon such matters, as to the validity of the drainage proceedings and the apportionment made against the appellants before the assessment was made or finally became a lien against appellant, and appellant failed to appear before said Board and failed to protest in writing or at all, questioning the validity of the proceedings had or

of the apportionment made or assessment to be made against it, and thereby waived and abandoned such right and cannot now be heard to complain.

Gorham vs. State Tax Comm., 266 U. S. 265.
First Nat. Bank vs. Comm. of Weld Co., 264 U. S. 450.
Milheim vs. Moffit Tunnel, 262 U. S. 710.
McGregor vs. Hogan, 262 U. S. 234.
Farncomb vs. Denver, 252 U. S. 7.
Robt. Noble Estate vs. Boise City, 19 Fed. (2d) 927, 933.
K. C. So. Ry. Co. vs. Levee Dist., (C. C. A. 8th Cir.), 15 Fed. (2d) 637, 641.
Union Pacific Ry. Co. vs. Board of Weld County, 217 Fed. 540.
State vs. Risty, (S. D. 1927), 213 N. W. 952.
Sanborn County vs. Estabrook, 49 S. D. 360.

The record in this cause shows that appellant never appeared before the Board of County Commissioners either in response to the notice to show cause why the drainage should not be established (under R. C. Sec. 8461) or in response to the notice to show cause why the tentative apportionment made should not be fixed as stated, under the proceedings initiated in 1916 (R. C. Sec. 8463) (R. 12, 13, 14, 99, 121), and they failed to urge the invalidity of said drainage law and the constitutional question here presented in the proceedings had on old Drainage Ditch No. 2, as shown by stipulation and judgment of the United States District Court of South Dakota. (R. 127-130).

In the case of *U. P. Ry. Co. vs. Weld County*, 217 Fed. 540, 544, 546, the Circuit Court of Appeals, Eighth Circuit, said:

> "We are not concerned with the cause of the invalidity of the tax. It may be due to illegality, unconstitutionality or fraud. Whatever the cause, it can do no more than make the tax invalid, and that alone is not ground for equitable jurisdiction. * * * We decline to express an opinion as to the validity of the tax. *That issue must be determined in an action under the statute.*"

In *Farncomb vs. Denver,* 252 U. S. 7, 12, upon a writ of error, this Court said:

> "As the plaintiff in error had an opportunity to be heard before the Board duly constituted (by § 300), they cannot be heard to complain now."

In *Milheim vs. Moffit Tunnel,* 262 U. S. 710, 723, this Court used the following language:

> "Where a city charter gives property owners an opportunity to be heard before a Board respecting the justice and validity of local assessments for proposed public improvements and empowers the Board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to complain of such assessment as unconstitutional."

In the case of *Gorham Mfg. Co. vs. State Tax Commissioner of N. Y.*, 266 U. S. 265, 269, this Court held:

> "We are of the opinion, however, that, without reference to these constitutional questions, the bill was properly dismissed by the District Court because of the failure of the company to

avail itself of the administrative remedy provided by the statute for the revision and correction of the tax.

"A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax cannot thereafter be heard by a judicial tribunal to assert its invalidity."

In the case of *Bagley Elevator Co. vs. Butler,* 24 S. D. 429, the Supreme Court of South Dakota said:

"Where a party whose property is assessed much higher than that of other taxpayers shall have requested the several Boards to equalize the taxes in the manner fixed by the statutes by raising the amount of all other property to its actual values, and such Boards shall have refused or failed to do their clear duty under the law, then and only then let such party apply to such Courts for relief."

In the case of *Sioux Falls Savings Bank vs. Minnehaha County,* 29 S. D. 146, the Supreme Court of South Dakota, referring to the *Bagley Elevator Co.* case, *supra,* said:

"We laid down a rule as to what was the duty of a party before applying to the courts for relief and held that the plaintiff in that case had not performed such duty. * * * We hold that such relief should only be granted as a last resort and where no better remedy was or had been available."

From the foregoing it is apparent that if the South Dakota drainage law gives property owners an opportunity to be heard before a tribunal or Board authorized to hear such complaints, then such

property owner must first submit his criticism of the law, and test its invalidity or its unconstitutionality or the apportionment made or the basis of such apportionment, to such Board or tribunal before such complaining party may submit such matters, including its unconstitutionality or invalidity, to the courts.

The South Dakota Drainage law providing for notice and hearing before the drainage ditch is established (R. C. Sec. 8461) reads as follows:

> "The Board shall fix the time and place of hearing of the petition and shall give notice thereof * * *. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

The petition filed, the time of hearing fixed, the notice given mentioned above, and the hearing had thereon, gave the Board jurisdiction over the drainage proceedings and the property affected. *Gilseth vs. Risty*, 46 S. D. 374; *in re Turkey Valley Drainage Ditch*, (S. D. 1927), 212 N. W. 48; *Haggart vs. Alton*, 29 S. D. 509.

Section 8462 of said statute further provides:

> "After full hearing the drainage may be established * * *. When the Board * * * shall have fully heard and considered said petition and all matters in opposition thereto, or in support of the same, it shall * * * deny * * * or establish said drainage" (in accordance with its findings).

Thus the law requires the state tribunal to fix a time and place of hearing, give notice to all persons

affected and have a complete hearing of the issues presented, make findings and enter its order thereon either establishing or denying the drainage. The question of the constitutionality of the drainage law or other invalidity of the proceedings may be presented, considered and determined at this first hearing.

The South Dakota drainage law further empowers the Board to fix a tentative apportionment of benefits among the properties affected and provides for notice and hearing on the equalization of such tentative apportionment (R. C. Sec. 8463) as follows:

> "Such notice * * * shall notify all such owners (of property affected) to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the Board of County Commissioners shall finally equalize and fix the same according to the benefits received."

These sections of the statute, as construed by the highest Court of the State, require that the County Commissioners fix a time and place of hearing, and that notice of such hearing be given by publication and posting. Any person affected or interested in the project is given an opportunity to file objections and have a hearing thereon, both before the drainage is established and again before the tentative apportionment becomes permanent, and before an assessment can be made thereon. After such hearing the Board is required to make its findings and determination according to the facts found. If persons are aggrieved, the law permits an appeal to be

taken and a trial had as an original action before the Circuit Court. (R. C. Sec. 8469).

Milne vs. McKinnon, 32 S. D. 627, 632.
State vs. Pound, 34 S. D. 628, 631.
In re Drainage Ditch No. 12, 44 S. D. 161.
State vs. Risty, (S. D. 1927), 213 N. W. 952.

These statutory requirements bring the proceedings had before the Board of County Commissioners under this drainage law into that class of legislation mentioned in *Farncomb vs. Denver*; *Milheim vs. Moffit Tunnel*, and other cases, supra, in that the property owner is given a notice of hearing and opportunity to be heard before the Board as to the validity of the proceedings had, and the justice of the apportionment made against such property owner before any assessment can be made.

Appellees therefore respectfully contend that appellant having failed to question the validity or the constitutionality of the drainage law, or the proceedings had thereunder before the State tribunal provided by statute, the Board of County Commissioners, or made any objection thereto at all at the times and place designated in the notices given by the Board under said law, it is not now in position to complain as to any of such matters, and by reason of its failure to appear and contest such proceedings upon said grounds at the time designated, it is now estopped from questioning the same in this Court.

Appellees' position as above outlined is in accordance with the holding of the Supreme Court of South Dakota. In the case of *Sanborn County vs. Esterbrook*, 49 S. D. 360, upon the presentation of

the constitutional question in answer to a writ of mandamus, the Court at page 362 said:

"Appellants upon the constitutional question say:

> 'Under this statute no inquiry is required at any stage of the proceedings as to whether the benefit to be derived by the property subject to assessment is equal to or greater than the amount of the assessment contemplated.'

"It is therefore urged that the constitutional provisions, both state and federal, are violated which require due process of law and the equal protection of the law. At the time the drainage ditch was established, Chap. 134, Laws 1907, was the law in effect. Sec. 5 of the Act (now R. C. Sec. 8462), provided for a hearing upon notice and said:

> 'When the Board of County Commissioners shall have fully heard and considered said petition and all matters in opposition to or in support of the same, they shall, if they find the proposed drainage not conducive to the public health, convenience or welfare or not needed or practicable for the purpose of draining agricultural lands, deny said petition. * * * If they find the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, they shall establish the drainage.'

"From that determination appeal was provided. It not being shown that the township

> was unjustly dealt with, we will not at this late state in the proceedings determine the abstract question presented. *The township is not in position to raise it.*"

Under the South Dakota law (R. C. Sec. 8463) the township is placed in the same class or category as railway companies. The highest Court of South Dakota has held that unless the constitutional question, if any, is timely presented to the Board by objection made at the hearing given, the protestant is not in a position to thereafter raise such question in the Courts.

Appellants further complain that the law provides no proper method for apportionment of benefits or basis for determination of apportionment of benefits to railroad companies, and claim that the tentative apportionment made is speculative, arbitrary, unjust, illegal, etc., and that the appellants never received any benefit at all. (R. 22). Each and all of these claims could and would at most only affect the validity of the apportionment, and as said by the Court in the Weld County case, 217 Fed. 540, supra, such issues must be determined in an action under the statute.

In the case of *Milne vs. McKinnon*, 32 S. D. 627, 631, 632, that Court said:

> "Whether it did receive any benefit from the drainage system and the extent of such benefits was a matter clearly within the jurisdiction of the board to determine, and its determination thereon, if honestly made, can only be reviewed upon appeal * * *. Any error, if any, in the method of assessment by

> which a wrong result may have been reached would be a matter to be considered by the reviewing court upon an appeal from the determination of the Board."

In the case of *Curtis vs. Pound*, 34 S. D. 628, 632, wherein a Board of County Commissioners constructed a ditch about twice the length of the one petitioned for and used a different size tiling than that ordered, the Court said:

> "If the commissioners exceeded their jurisdiction in the length of the ditch and size of tiling, its only effect, so far as appellants were concerned, was to increase the amount assessed against them above the amount that should have been assessed. This is a matter which should have been settled at the time of the assessment of benefits and expenses of construction, and appellants' remedy for an unjust or unwarranted assessment was through an appeal to the Circuit Court from such assessment."

WAIVER NOT A FEDERAL QUESTION.

This Court has held that a person may, by his acts or omissions, be estopped from asserting a right he once had under the Constitution of the United States, as well as under a statute, and *the question of whether he has or has not lost such right* by his acts or failure to act *is not a federal question.*

Gaar Scott Co. vs. Shannon, 223 U. S. 468, 470; *Hale vs. Lewis*, 181 U. S. 473, 479-80; *Pierce vs. Somerset Ry.*, 171 U. S. 642, 648; *Seneca Nation vs. Christy*, 162 U. S. 283; *Eustis vs. Bowles*, 150 U. S. 361.

Appellant having failed to file its objections as to the validity of the proceedings or of the drainage law at either the hearing on the establishment on October 3, 1916, or the hearing on equalization on August 1, 1921, has waived and lost such right and is now estopped from prosecuting such claims in this Court, as is held by the State Court in interpreting the said drainage statutes of South Dakota.

In the case of *State vs. Risty* (S. D. 1927), 213 N. W. 952, 957-958, wherein it is alleged and admitted, among other things, that the plaintiff therein did not appear and contest the establishment of the ditch or the validity and justice of the tentative apportionment made, at the time fixed therefor by the Board, the Court said:

> "The plaintiff, having neglected to avail itself at the time and place specified in the notice, of its right to file a protest, cannot now be heard to complain. * * * The notice given is sufficient to inform each and every person affected of his rights and of the time and place when and where he may file such objections, and there is no implied authority permitting the board to change the place when and where protests may be filed. The whole statute is explicit, and unless the protestant filed his written objection at the time and place indicated in the notice, he has waived such right. * * * The failure of the plaintiff and others like situated to file its written protest at the time and place appointed: namely, August 1st, 1921, constituted a waiver of its right to object to the tentative apportionments made by the board."

Hence, the validity and constitutionality of the

drainage law must first be submitted to the state tribunal. The appellant herein having failed and refused to submit said matter to the state tribunal, although it was given a notice and an opportunity to do so, and the State Court, in interpreting this drainage law, having already determined that by such failure or neglect to protest, at the times given, a party assessed waives his right and cannot thereafter complain, and is thereafter estopped and barred from asserting such right or claim in court, the appellant has waived its right to protest and cannot now be heard to complain. For these reasons appellees respectfully contend that this Court, in arriving at its determination, should follow the determination of the State Court in the interpretation of this statute and dismiss this appeal.

II.

APPELLANT IN THE TRIAL OF ITS CASE AGAINST THESE SAME APPELLEES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA IN JANUARY, 1922, ALLEGED THAT THE DRAINAGE LAW OF SOUTH DAKOTA WAS UNCONSTITUTIONAL, AND THAT COURT DECIDED AND DETERMINED THAT THE LAW WAS CONSTITUTIONAL, BUT GRANTED APPELLANT PART OF THE RELIEF DEMANDED FOR OTHER REASONS, FROM WHICH DECISION APPELLANT TOOK NO APPEAL, AND THEREFORE THE CONSTITUTIONAL QUESTION IS NOW RES ADJUDICATA AS BETWEEN THESE PARTIES, AND THE APPELLANT IS NOW ESTOPPED FROM RELITIGATING THAT QUESTION.

The record in this case (R. 103-104-105) shows that appellant alleged and litigated before the U. S. District Court for the District of South Dakota, in an action brought by it in July, 1921, and determined by that Court in January, 1922, the question of the unconstitutionality of the South Dakota drainage law. That Court held and decided (282 Fed. 364) against the contention of appellant and held the law constitutional. In that case appellant sought and prayed for a perpetual injunction, against the appellees, from making any apportionment or assessment against any of appellant's property. The United States District Court granted to appellant a part only of the relief prayed for, in that it restrained the appellees from making any apportionment or assessment upon appellant's property lying outside of the original drainage area of drainage district No. 2, upon the ground and for the reason there decided that the project there (and also here),

in litigation, was the maintenance and repair of old Drainage Ditch No. 2, and not an enlarged or new project; and the apportionment having been made upon the theory that the project was a new or enlarged project, was not made in accordance with the statute governing assessments for maintenance and repair (R. C. Sec. 8470), and was therefore illegal.

The decision of the United States District Court in that case (282 Fed. 364) was by these appellees later appealed to the Circuit Court of Appeals of the Eighth Circuit, from which decision an appeal was taken to this Court, and the opinion of this Court appears in 270 U. S. 378-383. In each of the opinions of the Federal Courts, those Courts necessarily passed upon and specifically decided, in arriving at their conclusion, that the drainage project in controversy was in fact and in substance not a new or enlarged project, but maintenance and repair of old Drainage Ditch No. 2, and the Trial Court held that law constitutional, and no appeal was taken from this holding.

COURT'S OPINION, LAW OF CASE.

It is well settled that in determining just what questions were decided by the decree of the Trial Court we may refer to the opinion of the Court in such cases.

In *Corcoran vs. Canal Co.*, 94 U. S. 741, 744, this Court said:

> "The opinion of the court, then, by virtue of that decree, has become, by well settled principles of jurisprudence, the law of the case as to the parties who were bound by that decree."

See also *Oklahoma vs. Texas,* 256 U. S. 70, 88.
Foundry & Pipe Works vs. Oconto Water Co., 183 U. S. 216, 234.
Baker vs. Cummings, 181 U. S. 117, 124-130.
Mining Co. vs. Mining Co., 157 U. S. 683, 690.
D'arcy vs. Hartford Co. (C. C. A.), 161 Fed. 733.
Stearns vs. Lawrence (C. C. A.) 83 Fed. 738.

Having found and determined that the project in controversy was the maintenance and repair of Drainage Ditch No. 2, and the holding on the constitutional question not having been appealed from, those two findings and determinations became the law of the case and are binding upon the parties thereto, and those questions cannot now be re-litigated by the same parties.

United States vs. Moser, 266 U. S. 236, 241.
Mitchell vs. First National Bank, 180 U. S. 481.
So. Pac. R. Co. vs. U. S., 168 U. S. 1, 48.
New Orleans vs. Citizens Bank, 167 U. S. 371, 396.
Russell vs. Places, 94 U. S. 606.
Cromwell vs. Sac County, 94 U. S. 351, 352.
Packet Co. vs. Sickels, 5 Wall 580.
Aspden vs. Nixon, 4 How. 464.
Hickey vs. Johnson, (C. C. A.), 9 Fed. (2d) 498, 502.
Ayres vs. Cone, (C. C. A. 8th Circuit) 138 Fed. 778.

A judgment between the same parties, upon the same cause of action, is an absolute bar to a subsequent action.

In *So. Pac. R. Co. vs. U. S., supra,* this Court said:

"The general principal announced in numer-

ous cases is that a right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once determined must, as between the same parties, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

From the holding and determination of the U. S. District Court granting appellant a part only of the relief prayed for, that is, restraining appellees from assessing appellant's property outside the drainage area of Drainage Ditch No. 2, but holding that appellant's property in the old drainage area was subject to assessment upon the basis of maintenance and repair, and in the same case holding that the drainage law of South Dakota was not in violation of the Fourteenth Amendment, appellant did not appeal; and not having appealed from such decision and determination, such determination and holding of not only the Trial Court but also of this Court upon appeal by the appellees, became the law of the case, and appellant is bound thereby and is now estopped from re-litigating the question of the constitutionality of the drainage law.

In *The Maria Martin,* 12 Wall 31-40, this Court said:

"Both parties to a civil action may sue out a writ of error to a final judgment (or appeal) but where one party exercises the right, the

other cannot assign error in the appellate court. * * * Where each party appeals, each may assign error, but where only one party appeals, the other is bound by the decree of the court below and he cannot assign error in the appellate court nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."

In the case of *Cleary vs. Ellis Foundry Co.*, 132 U. S. 612, 614, this Court said:

"For the reasons given in the opinion in *Avery vs. Cleary,* (132 U. S. 605), the peremptory instruction to the jury to find a verdict in favor of the plaintiff for the surrender value of Policy No. 68429 was erroneous, but as the defendant did not perfect a writ of error, the judgment below must be affirmed upon the ground that no error was committed to the prejudice of the plaintiff."

In the case of *Bowles vs. Outing Co.*, 175 U. S. 262, 268, this Court used the following language:

"Two other defenses were interposed which, * * if sustained, would require the judgment of the court below to be reversed and ultimately a verdict for the defendant. First, that the notice of copyright imprinted on the photograph did not fulfil the requirements of the statute; and second, that the copyright claimed by Bowles is not sanctioned by the constitution. *It is sufficient to say of these that the defendant did not take out a writ of error and cannot now be heard to complain of any adverse rulings in*

the court below. Canter vs. Ins. Co., 3 Pet. 307; *Chittenden vs. Brewster,* 2 Wall. 191; *The Stephen Morgan,* 94 U. S. 599; *Clark vs. Killian,* 103 U. S. 766; *Loudon vs. Taxing District,* 104 U. S. 771; *Cherokee Nation vs. Blackfeather,* 155 U. S. 218."

After citing the above cases and giving some of the above quotations, Circuit Court Judge Sanborn in the case of *Guaranty Co. vs. Phoenix Ins. Co.*, 124 Fed. 170, says:

"No decision in the Federal Courts in which this rule (set forth in above quotations) has been disregarded or doubted have been called to our attention and none have rewarded a diligent search. The rule has been in force so many years that it is not now a matter of reason but a question of practice. It is to be determined not by an independent consideration and decision of what the rule ought to be, but by a view of the precedents in the national courts which disclose the practice which has been and is prevailing in those courts. The decisions and opinions to which reference has been made disclose the fact that this uniform practice has been and is in accordance with the following rules.

"One may not maintain a writ of error or an appeal from a judgment or decree *which is* so *favorable to him that it secures him all the relief he seeks.*"

Thus, if a party does not secure all the relief which he sought, securing a part only of the same, then such party must exercise his right of appeal

or cross appeal in the first instance, because as to such unsecured relief so sought, he alone is prejudiced and he alone can complain and appeal. The opposite party being the beneficiary of such unsecured relief so sought, under the above rule, cannot appeal from that part of the determination in favor of himself. Therefore, if a party secure a part only of the relief sought by him, the holding and determination of the court adversely to him and in favor of the opposite party becomes the law of the case as to him unless he appeals or cross appeals.

The Court further says in the last above opinion:

> "A defendant in error who does not sue out a writ of error or an appellee who does not take an appeal cannot confer jurisdiction upon an appellate court to consider questions suggested by an assignment or argument of cross errors, nor can he be heard upon such questions."

See also, *Peoria etc. R. Co. vs. United States*, 263 U. S. 528, 536.

Swager vs. Smith, (C. C. A. 4th) 194 Fed. 762, 766.

Therefore, appellees respectfully contend that it having been decided by the Federal Courts in a former case, between these same parties, upon issues properly made, concerning this same drainage project, first, that the work done and performed was maintenance and repair of Drainage Ditch No. 2; and, second, that the South Dakota drainage law was not in violation of the Fourteenth Amendment to the Constitution of the United States: those said two matters are now the law of this case

and res adjudicata, where, as in said former action, the appellant, having obtained only a part of the relief sought by it, failed and refused to appeal from such adverse decision; that the part so unfavorable to appellant, namely, the constitutionality of the South Dakota drainage law, became and is now, as to these parties, the law of the case, and appellant is now estopped and barred from re-litigating either of these questions.

III.

APPELLANT HAVING PAID ITS ADMITTED JUST PROPORTION OF THE COSTS OF DRAINAGE DITCH NO. 2 UNDER THE DRAINAGE LAW CONTAINING PROVISIONS FOR REPAIR AND MAINTENANCE OF SAME, AND HAVING RECEIVED BENEFIT THEREUNDER, IS NOW ESTOPPED FROM QUESTIONING THE VALIDITY OF SUCH LAW TO ESCAPE PAYMENT OF ITS JUST PROPORTION OF THE MAINTENANCE AND REPAIR OF THAT DITCH.

Prior to November 4, 1910, there was established, constructed and completed what was designated as "Drainage Ditch No. 2" (R. 4, 10, 106, 127, 128); an apportionment was made, and on November 4, 1910, hearing had thereon and appellee Board entered its order of equalization, from which order appellant company appealed to the State Circuit Court, removed said cause to the United States District Court (R. 128), and on January 3, 1912, stipulated that its just proportion of assessment for the cost thereof resulting from benefit was the sum of $8,500.00 (R. 127-128-129), and on January 15, 1912, an order and judgment in accordance with said stip-

ulation was entered in said Court (R. 120-130) and thereafter and on April 8, 1912, appellant paid said assessment. (R. 131).

In 1916, a petition was presented to appellee Board to reconstruct, enlarge and improve Drainage Ditch No. 2 (R. 10, 111, 114), and thereafter such proceedings were had as required by law, pursuant to notice given, and on October 3, 1916, (no one objecting or protesting), the Board granted the prayer of the petition. (R. 102-103, 112-113).

On June 10, 1921, appellee Board made a new tentative apportionment of benefits on the last above project and gave notice, as required by law, fixing August 1, 1921, as the time for hearing on equalization thereof (R. 12, 46-90, 116), at which time appellant made no remonstrance or objection to the new tentative apportionment made, or the validity of the proceedings or of the drainage law. (R. 21, 121, 122).

Prior to the August 1, 1921, hearing on equalization and about July 25, 1921, appellant instituted an action in the United States District Court against appellees to obtain a perpetual injunction restraining and enjoining appellees from making and collecting any assessment against appellant company or its property for the costs of work done and improvements made on Drainage Ditch No. 2. (R. 14, 117, 102, 103, 104, 105).

Upon the trial of the issues in that case that Court on March 2, 1922, found, decided and held that the work done and performed under the aforesaid proceedings constituted maintenance and repair of old Drainage Ditch No. 2, the case being reported in 282 Fed. 364.

Thereafter appellees herein appealed said cause to the United States Circuit Court of Appeals, Eighth Circuit, (297 Fed. 710), and from that Court to the Supreme Court of the United States, which latter Court on March 1, 1926, affirmed the decree of the Circuit Court of Appeals (270 U. S. 378), and each of said Courts held, found and determined that the work and labor done on said project constituted maintenance and repair of old Drainage Ditch No. 2.

We have hereinbefore presented the authorities giving the well settled rule of law that the opinion rendered by a trial court may be read in conjunction with the decree of that Court, in a given case, to determine just what were the findings of the Court and the basis of the decision (p. 23, supra). It has been settled by the above mentioned decisions in the Federal Courts that as between the parties hereto, the work and labor done and performed upon the present drainage project during and subsequent to the year 1916, in payment for which assessments to be made are here contested, was merely maintenance and repair on the old ditch.

The Federal Courts having decided, in the due exercise of their jurisdiction, the character of the work done as between the parties hereto, viz: maintenance and repair — the matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified.

Chi., R. I. & Pac. R. Co. vs. Schendel, 270 U. S. 611, 617.

U. S. vs. Moser, 266 U. S. 236, 241.

Hickey vs. Johnson, 9 Fed. (2d) 498, 502.

After having confessed and paid its just proportion of the costs of the establishment and construction of Drainage Ditch No. 2, or the sum of $8,500.00, and thereby recognizing the validity of said drainage proceedings and the drainage law of South Dakota, appellant now asserts that it should not pay any proportion of the costs of the maintenance and repair thereof, because, as it now alleges, the law is invalid and unconstitutional. These appellees respectfully contend that appellant, having once recognized the validity of that proceeding and the drainage law governing the same and having accepted the benefits derived therefrom, cannot now assert that the proceedings and the drainage law under which the improvements were made are invalid and unconstitutional.

Pierce Oil Corp. vs. Phoenix Refining Co., 259 U. S. 125, 128.
Wall vs. Parrott Silver & Copper Co., 244 U. S. 407, 411.
Pullman Co. vs. Kansas, 216 U. S. 56, 66.
Pierce vs. Somerset Ry., 171 U. S. 642, 648.
Electric Co. vs. Dow, 166 U. S. 489.
Eustis vs. Bowles, 150 U. S. 361.
Great Falls Mfg. Co. vs. Garland, 124 U. S. 581, 597.
Dunn vs. Fort Bend Co., 17 Fed. (2d) 329, 333.
Muscatine Light Co. vs. Muscatine, 256 Fed. 933.

In the case of *Pierce vs. Somerset Ry.*, 171 U. S. 642, 648, this Court said:

> "A person may by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question wheth-

er he has or has not lost such right by his failure to act or his act is not a federal one."

In *Muscatine Light Co. vs. Muscatine,* 256 Fed. 933, the Court said:

> "A person may, by his acts or omission to act, waive a right which he may otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid if the party making the objection had not, by prior acts, precluded himself from being heard in opposition."

In *Eustis vs. Bowles,* 150 U. S. 361, this Court held that Eustis possessed a right which was protected by the Constitution of the United States, but that this right the state court held had been waived by him by his action, and as to whether the State Court was right or not was not in fact a federal question.

In the case of *Pierce Oil Corp. vs. Phoenix Refining Co.,* 259 U. S. 125, 128, this Court used the following language:

> "The contention that this order of a tribunal, to the jurisdiction of which the company had voluntarily submitted itself, made after notice and upon full hearing, deprives it (appellant) of its property without due process of law, must be pronounced futile to the point almost of being frivolous. 'By accepting the privilege it voluntarily consented to be bound by the conditions' attached to it (216 U. S. 56, 66). And while enjoying the benefits of that privilege, it will not be heard to complain that an order plainly within the scope of statutes in effect

> when it entered the state is unconstitutional. * * * There is nothing in the nature of such a constitutional right as is here asserted to prevent it being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right."

In the case of *Pullman Co. vs. Kansas*, 216 U. S. 56, 66, concerning the right of a state to regulate or prohibit the business of foreign corporations in a state, this Court said:

> "When, therefore, in a case where the absolute power to exclude obtains, a condition is affixed to the right to come into a state, and a foreign corporation avails of such right, it may not assail the constitutionality of the condition because, *by accepting the privilege, it has voluntarily consented to be bound by the condition.*"

The statute law with reference to the method of payment of the cost of the original construction and also of the maintenance and repair of Drainage Ditches is the same now as it was when Drainage Ditch No. 2 was constructed and paid for. (R. C. Secs. 8464, 8467, 8470). (R. 26-44). The appellant, as a party to said proceeding, was charged with knowledge of this law at the time it admitted that it received benefit, and agreed to pay and paid for its proportion of the cost of said original construction, and further that said ditch would eventually require maintenance and repairs, and that it would have to pay its just proportion of the cost thereof pursuant to the said drainage statute. It

could not be a party to the creation and maintenance of a project which might subsequently become a public nuisance, or a project which might become inherently dangerous to adjacent property without contemplating and providing for the maintenance, repair and control thereof. At the time appellant recognized the validity of the proceedings establishing Drainage Ditch No. 2, and the drainage law and benefits received by it thereunder, and paid its proportion of the costs thereof, it tacitly undertook and agreed that it would, under such drainage law, pay for the maintenance and repair thereof, which would necessarily follow, to prevent the same from damaging or injuring adjacent property and to keep the same functioning.

In the case of *Dunn vs. Fort Bend Co.*, 17 Fed. (2d) 329, 333, tried before a three judge Court, Judge Hutcheson said:

> "The invocation of the Fourteenth Amendment is a privilege; the fact that a statute may be obnoxious to the Fourteenth Amendment as to a particular person does not mean at all that it may be so as to another; and this right to invoke the Fourteenth Amendment, being a personal privilege, may be lost by election, waiver, or estoppel. The facts in this case, in the light of the decisions, leave no doubt that any person who might at any time have questioned the validity of the district has long since lost that right by estoppel, waiver or election; the district having existed as a going district for more than sixteen years."

From the foregoing statements of this and other

Courts, it is apparent, and appellees respectfully contend, that appellant, having consented to and paid its just proportion of the cost of the construction of said original drainage ditch No. 2 in 1912 and received the benefit therefrom, is now estopped and barred from questioning the validity of said proceedings, or the constitutionality of said drainage law, in order to thereby escape the payment of his just proportion of the costs of the maintenance and repair of said original drainage ditch.

CONSTITUTIONAL QUESTION.

In discussing appellant's argument as to whether the drainage law of South Dakota violates the Fourteenth Amendment to the Federal Constitution we will follow, as closely as we can, the order of argument of appellant.

I.

NOTICE AND HEARING BEFORE ORGANIZATION OF DISTRICT NOT CONSTITUTIONALLY REQUIRED, BUT ARE PROVIDED BY SOUTH DAKOTA DRAINAGE STATUTE.

Appellant's first contention is that a property owner must have a hearing on the inclusion of his property in a drainage assessment area before the construction of the drainage ditch in order that the law be constitutional. (Pages 15 to 30 Appellant's Brief).

In this appellees contend that appellant is in error.

The constitutional provision relied on, "nor shall any state deprive any person of (his) property without due process of law", is readily divisible into two requirements: First, there shall be no taking of his property, and second "without due process of law": The thing prohibited is the "taking", but even this is not prohibited if it is done with "due process of law." In tax matters there can be no "taking" of an individual's property until the assessment lien becomes incontestible or irrevocable; such a fixed and permanent charge that the property owner can have no adequate remedy to contest

its validity or fairness. Then and then only is the property taken.

In this case the filing of the petition asking for the drainage project, under R. C. Sec. 8459 (R. 27), does not take property or place any lien thereon. The survey provided by the statute, the inspection by the Board of the proposed route, the making of the survey of the proposed drainage area, the furnishing to the state engineer of a copy of the surveyor's report, maps, plans and profiles, the determining of the exact line and width of the ditch, the adoption of a unit of benefit, the making of a tentative apportionment, neither singly nor collectively, in any manner place a lien or charge upon the individual's land or property and has no more or additional effect than the filing of the original petition. And if these acts place no lien upon the individual's property, then there is no "taking" of his property, and it is only the "taking" that is constitutionally protected.

The phrase "due process of law" as applied to tax proceedings, means simply that such notice, hearing and opportunity to contest the tax and the validity thereof be given before the tax becomes a fixed lien, as is appropriate to the nature of the case and is ordinarily and customarily given in such matters under procedure generally adopted in like or similiar matters in the state.

The constitutional guaranty must at all times be distinguished from notices, hearings and procedure which have been or may be prescribed by the legislature. The legislature of a state may make many things prerequisite in tax proceedings, all of which must be strictly followed to make a tax a

valid tax, while few are constitutionally required. For example, in South Dakota the legislature saw fit to require a notice and hearing upon the petition filed for the establishment of a drainage ditch, at which hearing there may be contested (R. C. Sec. 8462, R. 29) the statements of the petition, namely (R. C. Sec. 8459, R. 27): the petitioners are owners of land likely to be affected by the drainage, the necessity for the drainage, whether the same will be conducive to the public health, convenience or welfare or necessary or practicable for the drainage of agricultural lands, the correctness of the proposed route or of its initial and terminal points, the territory likely to be affected thereby, whether the territory likely to be so affected, either benefically or detrimentally, will in fact be affected, and whether the tracts of land proposed to be taken for right-of-way and spoil banks should in fact be taken. There may also be contested the matters set forth in the surveyor's report and the finding of the Board as to the width and as to the route (R. C. Sec. 4262, R. 29), or a property owner may question the validity of the law or of the proceedings had, or put forward any other objection that can be raised upon the hearing on equalization under Sec. 8463 (R. 30). *State vs. Risty,* (S. D., 1927), 213 N. W. 952, 959. But there is no constitutional requirement that any of these matters shall be first determined upon notice and hearing, except, of course, the eminent domain feature, which is not here involved. None of these things place an incontestable lien or charge upon the individual's property and there is therefore no "taking". All of the foregoing matters are purely political matters. These prescribed acts are acts which finally

result in placing a tax upon lands and property in the drainage assessment area, and are acts which the legislature has required the Board to perform, but there is no constitutional requirement that the owners of land or property which may ultimately be compelled to pay for an improvement shall be given notice and hearing at each stage of the proceedings or at the time the foregoing acts are performed by the Board, — because such acts do not place an incontestable or irrevocable lien upon property and do not constitute "taking" of property.

The rule is practically universal, even where the legislature has delegated the authority to determine the necessity, that, where a taxpayer has been given a notice, hearing and an opportunity to contest the amount and validity of his assessment, benefit or tax, before the same becomes irrevocably fixed, such procedure satisfies the "due process of law" clause of the Constitution.

This Court, in the case of *Soliah vs. Heskin,* 222 U. S. 522, 524, in passing upon the constitutionality of the North Dakota drainage law of 1905, said:

> "Neither does that amendment (the Fourteenth Amendment to the federal constitution) invalidate an act authorizing an appointed Board to determine whether a proposed drain will be of public benefit and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property."

In the case of *Londoner vs. Denver,* 210 U. S. 373, 378, this Court said:

> "The only question for this court is whether the charter provision authorizing such a finding (the necessity for the improvement), without notice to the land owner, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment which might or might not subsequently be made. Clearly all this might validly be done without hearing to the land owner, provided a hearing upon the assessment itself is afforded."

In *Land Co. vs. Kansas City,* 241 U. S. 419, 427, wherein the proceedings had were for raising the amount of money necessary to pay for specific property condemned, this Court said:

> "It is also well settled that an owner of property which may be assessed for benefits in order to pay an award for property condemned is not entitled, by virtue of the 14th Amendment, to insist upon being made a party to the condemnation proceeding, or to be heard with respect to the amount of the award. He may not demand, as a Federal right, that the power of eminent domain shall not be exercised save upon notice to him. (Citing cases). As well might it be argued, as was suggested in *Goodrich vs. Detroit, supra,* that whenever the city contemplated a public improvement of any de-

scription, it would be necessary to give notice to all those who might be taxed to pay for it. The established rule is 'that it is only those whose property is proposed to be taken for a public improvement that due process of law requires shall have *prior notice*'." (*).

See also *Goodrich vs. Detroit,* 184 U. S. 432.

In *Spencer vs. Merchant,* 125 U. S. 345, 356, this Court said:

"If the legislature provides for notice to and hearing of each proprietor at some stage in the proceedings upon the question of what proportion of the tax shall be assessed upon *his* land, there is no taking of his property without due process of law."

See also *Voight vs. Detroit,* 184 U. S. 115.

In *Roberts vs. Smith,* (Mich., 1897), 72 N. W. 1091-1092, the Court said:

"The principal objection made is that, under the law as it now reads, persons who do not own lands traversed by the drain but who are within the assessment district, have no opportunity to be heard upon the question of the necessity for laying the drain. * * * We are not aware of any cases that hold that all persons subject to assessments for drains must have notice of and a hearing upon the question of public necessity."

In *Ross vs. Board,* (Iowa, 1905), 104 N. W. 506, 510, that Court said:

"It is claimed by counsel that complainant was entitled to notice of the hearing relating

---

(*) All italics in quotations herein are ours.

to the establishment of the assessment district and of the amount of the total assessment * * *. In the case before us, there is, under the statute, as amended, ample provision for notice to every land owner and opportunity given for the hearing of all objections he may have to assert against the validity and justice of the proposed charge upon *his* property. This, under the law, is all he can rightfully ask."

In *State vs. Redwood County,* (Minn., 1889), 42 N. W. 473, the Court at page 475 held it to be a false assumption:

"That in proceedings in the exercise of the taxing power the property owner is entitled to notice and to be heard in each preliminary step in the proceedings *pari passu* with their progress. * * * We doubt whether any tax law ever provided for any such thing. The principle running through all the cases is that a law does not infringe upon the constitutional provision under consideration if the property owner has an opportunity to question the validity or amount of the tax, either before that amount is determined or in subsequent proceedings for its enforcement."

In the case of *In re: Bonds of Madeira Irrigation District,* (Cal., 1891), 28 Pac. 273, 278, that Court said:

"The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the or-

> ganization of the district are only for the creation of a public corporation to be invested with certain political duties which it is to exercise on behalf of the state. * * * * It must be observed that such proceeding does not affect the property of anyone within the district and that he is not, by virtue thereof, deprived of any property * * *. His property is not taken from him without due process of law if he is allowed a hearing at any time before the lien of the assessment thereon becomes final."

In *Bemis vs. Guirl,* (Ind., 1914), 105 N. E. 496, 498, the Court said that it was contended concerning the law in controversy "that it makes no provision for notice to appellant or other persons of a hearing on the question of the public utility of the proposed improvement", and at page 500 held:

> "It is not required that the property owner shall be notified of the initial or every intermediate step in the proceeding leading to an assessment against his property. It is sufficient if provision is made for notice and opportunity to be heard before an impartial tribunal before the assessment becomes final and conclusive."

In *Erickson vs. Cass Co.,* (N. D., 1902), 92 N. W. 841, 843, that Court said:

> "It is true several acts are required to be done by the drain commissioners prior to the assessment and hearing. These include an inspection of the route by the drain commissioners, a survey of the same, the making of the specifications, plats and profiles, contracts for

right of way and the order establishing the drain; all of which are done without a hearing. These steps, however, are altogether preliminary and do not in themselves impose any burden upon the land owner."

To the same effect are the following cases:

Paulsen vs. Portland, 149 U. S. 30, 41.
Davidson vs. New Orleans, 96 U. S. 97, 105.
Wurtz vs. Hoagland, 114 U. S. 606, 615.
State vs. Burns, (Minn., 1914), 145 N. W. 377-378.
Johnson vs. Lewis, (Ind., 1888), 18 N. E. 7, 8.
In Re: McRae, (Minn., 1904), 100 N. W. 384, 385.
Brumfield vs. State, (Miss.) 59 So. 921.
Corliss vs. Richford, (Vt., 1911), 81 A. 234.
Haggert vs. Alton, 29 S. D. 509, 529.

Most of these cases here quoted and cited are those in which the improvement district was not created by the legislature of the state, but by a board acting under the authority conferred by statute. These holdings are in direct contradiction of the contention urged by appellant on pages 21 to 26 of its brief and for which it cites no authority at all.

Appellees respectfully contend that the protection afforded the property owner by the Fourteenth Amendment goes only to the "taking" of his property, and that all steps leading up to the final step which does in fact take his property, or in other words, places an irrevocable lien upon the same from which the law gives him no escape, are mere preliminary steps and are purely political matters

concerning which this constitutional provision affords him no protection; that the rule has been long and well established that if the property owner be given a notice, hearing and an opportunity to contest the validity of the proceeding and the amount of his benefit, assessment or tax prior to the same becoming a fixed and irrevocable lien against his property, as is given by R. C. Section 8463 (R. 30), the constitutional provision for his protection has been satisfied, and there is no taking without due process of law.

STATUTE DOES PROVIDE FOR NOTICE AND HEARING BEFORE FORMATION OF DISTRICT.

Although appellant is not constitutionally entitled to a notice of the formation of the district, the confines thereof, or a hearing upon the same, the drainage statute of South Dakota does in fact require the giving to appellant and to all other persons affected, whether their properties are traversed by the proposed ditch or not, a preliminary notice, after the filing of the petition and before the hearing is had for the establishment or non-establishment of the drainage district or assessment area.

R. C. 1919, Sec. 8459, (R. 27), provides that a petition to establish a drainage shall contain (1) a statement of the necessity of the drainage (2) a description of the proposed route; and (3) a *statement of the territory likely to be affected thereby.*

Sec. 8461 (R. 28), provides that a notice of hearing shall be given and that such notice shall set forth (1) the route of the proposed drainage; (2) *the tract of country likely to be affected thereby in*

general terms; (3) the separate tracts of land through which the drainage will pass; and (4) refer to the files for further particulars.

Sec. 8462 (R. 29), provides that upon the hearing, pursuant to the foregoing notice, upon the petition filed, that *any person interested may appear and contest* (1) *the statements* of the petition, which include *the statement of the territory likely to be affected;* (2) the matters set forth in the surveyor's report, and (3) the finding of the Board as to the width and route of the drainage ditch. The petitioners may likewise be heard in support of the petition. We have hereinbefore attempted to set forth some of the issues and some of the grounds of protest that may be raised and presented at this hearing. (Page 39, supra). (*In re Drainage Ditch No.* 12, 44 S. D. 158, 161; *State vs. Risty,* (S. D., 1927), 213 N. W. 952, 959.

The notice given under Sec. 8461 (R. 28), for hearing the petition fixes the tentative confines or boundary of the drainage district and describes the lands and properties that, in the judgment of the Board and surveyor, are likely to be affected by such drainage ditch. They may not be all affected benefically, and some, in fact, may be affected detrimentally, or some may not be affected at all; but it gives to all such owners of property described an opportunity to appear and to there present to the Board the facts concerning their said property. At such hearing their land may be entirely excluded from the assessment area, or it may be determined that it is damaged by flooding and claims presented for such damages, or other issues may be tendered as hereinbefore set forth. (Page 39, supra). The

notice given describing the tract of country likely to be affected describes the property by definitely specifying each section, township, range and city subdivision, claimed to be affected by the drainage project, and notifies the owners of such property of said hearing and summons them to contest the inclusion of their land in such drainage district. The second part of the notice runs to the owners of land whose property will be taken for the right of way, spoil banks, or for ponding back purposes of the drainage project, and applies alone to the eminent domain feature of the law, which is not here in controversy.

Sec. 8462 (R. 29), also provides that if the Board at the hearing extend or vary the proposed ditch to fully accomplish the drainage, then it shall adjourn the hearing and give a new notice "to all parties newly affected as in the case of the original hearing". This requirement conclusively shows the intent of the legislature that all persons whose land or property will be *affected* must have a notice and opportunity to appear and contest the inclusion of their property within the district.

Therefore, if these statements in the petition and notice and the matters that may be contested, as to the *tract of country likely to be affected* by such drainage project do not evidence an intention of the legislature to require the Board to determine, at this hearing, the general boundaries of the drainage district that will be affected and included in such project, then appellees can see no purpose for that part of the *petition,* and *notice* describing the "tract of country likely to be affected by such improvement", nor can there be any reason or pur-

pose in the law allowing at the hearing contest of the statements of the petition, which contains a "general statement of the territory likely to be affected," or any purpose in the new notice and hearing "to all parties newly affected" required by R. C. Sec. 8462 (R. 29), when the route of the ditch is so changed by the Board at its first hearing as to affect new territory. Obviously these provisions of the law extend to and require a hearing upon the facts required to be stated in the petition and notice, namely, as to what property is likely to be affected. Whether or not certain property will or will not be affected is a fact question, and this notice and hearing gives such property owners the right to be heard upon that question. Surely the law would not require or contemplate an idle act. A notice, hearing and determination, and the right to contest the "tract of country likely to be affected" is expressly given by Sec. 8462. (R. 29). If a hearing and determination upon "the tract of country likely to be affected" is not to be had, then there is no purpose in the requirement of the law of such description being put in the petition and notice, or the opportunity given to contest that question. All that need be required would be a notice to the land owners through whose lands the ditch would pass, in order that they might appear and present their claims for damgaes, if any, under the eminent domain feature of the law, and we have shown that there is no constitutional requirement of a prior notice as to other parties who may simply be compelled to pay their just proportion of the costs of the project. (Pages 37-46, supra).

See also *Fallbrook vs. Bradley*, 164 U. S. 113, 174.
Paulsen vs. Portland, 149 U. S. 30, 41.

Appellees therefore respectfully contend that under the law of South Dakota, the tentative confines of the drainage district are established by the Board at the first hearing upon the petition presented, and unless there is a special exclusion order made, the district or assessment area thus established must be deemed to include all the lands or properties described in said petition and notice as likely to be affected and that can if benefited be assessed for costs of the project. No other reasonable construction of the statute can be given. If the property owner does not make this showing or secure the exclusion of his property from the confines of this drainage district at this hearing, the land or property is within the assessment drainage area or district, and the question remaining for determination at the second hearing is the amount of benefit, if any, which said property receives from the drainage project.

The District Court of the United States for the district of South Dakota has twice sustained the constitutionality of the South Dakota drainage statute, here involved, prior to its determination in this case, viz, in *Chicago, R. I. & P. Ry. Co. v. Risty,* 282 Fed. 362, 365-371, and *Johnson v. Peterson,* which latter case was affirmed upon appeal by the Circuit Court of Appeals, 8th Circuit, reported in 288 Fed. 735, 738, where the Court found there was ample notice before any final determinations were made. The Supreme Court of South Dakota found the law provided sufficient notice and opportunity to be heard in the case of *State v. Risty,* (S. D., 1927), 213 N. W. 952, 959).

CRITICISM OF STATUTE PRESENTS NO CONSTITUTIONAL QUESTION.

Appellant on page 17 of its brief finds fault with the requirement of the statute for the contents of the first notice, in that it is addressed to all persons interested and describes the property likely to be affected without naming the owner of the property described.

In taxation matters the method to be pursued, the kind of notice to be given, the manner of collecting the tax, etc., are all matters within the exclusive power of the Legislature of the State, and if the notice directed by the statute to be given, and in fact given, is such as will, in all reasonable probability give notice to the parties interested, the constitutional requirement as to notice is fully satisfied. Where the notice to the person or the proceeding in regard to the property is appropriate to the nature of the case the proceedings cannot be said to deprive the owner of his property without due process of law.

Davidson vs. New Orleans, 96 U. S. 97, 105.
Paulsen vs. Portland, 149 U. S. 30, 40.
Fallbrook Irr. Dist. vs. Bradley, 164 U. S. 112, 157-8, 174.
Bauman vs. Ross, 167 U. S. 548, 590.
Wright vs. Davidson, 181 U. S. 371, 382.

Notices describing the land without naming the owner thereof have been held sufficient in the following cases:

State vs. Risty, (S. D., 1927), 213 N. W. 952, 959.

Everington vs. Board, (Minn., 1912), 138 N. W. 426, 428.

In re: McRae, (Minn., 1904), 100 N. W. 384, 386.

Hennessy vs. Douglas Co., (Wis., 1898), 74 N. W. 983, 989.

People vs. Brooklyn, 4 N. Y. 419.

Lamb vs. Connelly, (N. Y., 1880), 25 N. E. 1042, 1043.

Kansas City vs. Duncan, (Mo.), 37 S. W. 513.

Lent vs. Tillson, 72 Cal. 404.

Appellees respectfully contend that the notice required by the drainage law of South Dakota, and the hearing given are such notice as is appropriate to the nature of the case, and will in all reasonable probability give notice to the parties interested, and that it therefore is sufficient to answer the requirements of the due process of law clause of the Federal Constitution.

THE STATUTE PERMITS ALL NECESSARY ADJUSTMENTS.

This brings us to the second notice and hearing, given under R. C. 1919, Sec. 8463 (R. 30), and appellant finds no particular fault with this notice and hearing except that he says, "he is like a rat in a trap." (Appellant's Brief, page 19). But is he like a rat in a trap if it can actually escape the payment of any invalid or unjust assessment even upon this hearing? Appellees respectfully submit that if it receives no benefit from the drainage project, it can escape payment of any assessment at this hearing by making its showing.

The statute requires that the notice given of this hearing for equalization of the apportionment of benefits shall be published and posted in exactly the same way as the notice given for the establishment of the ditch under Sec. 8461. (R. 28). A tentative apportionment is made by the Board, taking some tract as a unit and determining its value before and after the drainage project has been constructed and completed; the difference between such values being the value of actual benefit to the unit. In the case of *Milne vs. McKinnon,* 32 S. D. 627, 632, the Supreme Court of South Dakota, in interpreting this provision, said:

> "The drainage act provides that in apportioning the benefits among the several tracts benefited by the drainage system, the Board shall select one tract, *the benefit received by which,* shall be taken as a unit from which to measure the benefits received by all other tracts."

It will thus be seen that the yardstick of measurement used is a definite amount in dollars and cents. In like manner the apportionment is made to all other tacts or property of every class in the drainage assessment area, and the difference in values thus secured, as to each tract or property, is divided in each instance by the unit amount of actual benefit, secured as aforesaid, to determine the number of units of actual benefit to be fixed to each tract or property, whether such tract be agricultural land, railroad properties, municipal properties, roads or other classes, as the method indicated is equally applicable to any of these classes of property, because the common denominator used in each and

every instance, is a definite amount in dollars and cents.

In the case of *State vs. Risty,* (S. D., 1927), 213 N. W. 952, 957, that Court said, as to the issues that may be presented and decided at this second hearing:

> "The matters to be considered before the Board upon this hearing and by the Circuit Court upon appeal are one and the same * * *, namely: Is the tract taken as a unit benefited at all, and if so, how much? Is the protestant's tract benefited, and if so, is its benefit equal to — or more or less than — the benefit to the unit? Therefore, whether the land and property of plaintiff received any benefits, and the extent of the same, is clearly one of the issues to be heard and determined by the Board. The benefit to the unit, if any, is another issue, and the relative benefit of the protestant's property to the unit is another issue. Whether the method pursued is wrong, or one by which a wrong result might be reached, is also an issue. *Milne vs. McKinnon,* 32 S. D. 627. If acts were taken by the Board subsequent to the establishment of the ditch by which the assessment would be increased or would result in an unjust or unwarranted assessment, this, too, is a proper issue for trial before the Board. *Curtis vs. Pound,* 32 S. D. 492. * * * (at p. 959). At the hearing held pursuant to this notice, an interested party may appear and show any reason why his property should not be assessed that he could have shown at the hearing for determining whether the drainage should be estab-

lished. If his property will not be benefited by the establishment of the drainage, this may be shown at either hearing, and if shown at either hearing, his property will not be assessed."

We have now shown that under this statute, as interpreted by the Supreme Court of South Dakota, appellant, after the notice and at the hearing given under Sec. 8463, can have determined the justice and validity of the assessment and the amount of benefit received by it, if any. If its land or property is not benefited, it will be excluded and no assessment made against it. Appellees respectfully submit that this notice and hearing provided for by statute answers all the requirements of the "due process of law" clause of the federal constitution, and that the unit of benefit provided is altogether proper and generally applicable.

APPELLANT'S CASES DISTINGUISHED.

A casual analysis of the Fallbrook and Embree cases, as well as others cited by appellant, will disclose that they do not support the proposition contended for by appellant, namely, that it is necessary that a notice and hearing be given at the time of the establishment of the drainage ditch and before any construction work is done thereon, to make such law constitutional. In each of those cases the court held that it was essential to due process of law that the land owners be accorded an opportunity to be heard upon the question of whether their lands would be benefited, and it so happened that this hearing was given under the law before the works

were constructed, but that is far from holding that it is constitutionally necessary to have such hearing, to determine whether the properties are benefited, before the works were constructed.

Appellant also cites, on page 25 of its brief, the case of *Soliah vs. Heskin,* 222 U. S. 522, in which this Court passed upon the North Dakota drainage law of 1905, but counsel have misconstrued this case. It is true the opinion recites that a certain first notice is given and then at page 523 says:

> "Their assessment of benefit is subject to review, but when confirmed is final, and is then extended on the tax list and collected as other taxes."

And in regard to this latter statement, further at page 524, says:

> "Neither does that amendment (14th Amendment) invalidate an act authorizing an appointed Board to determine whether the proposed drainage will be of public benefit and to create a drainage district consisting of land which it decides will be benefited by such drain and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property."

It is quite apparent from a reading of the quotation that it does not refer to the first notice mentioned in the opinion, but does refer to the matter of assessment of benefits. This case was originally decided by the Supreme Court of North Dakota in 1908, and is reported in 117 N. W. 125. In its opin-

ion the North Dakota Supreme Court at page 128 said:

> "'In *Erickson vs. Cass County,* the drainage age was construed and its constitutionality upheld, as against the contention that it authorized the taking of property without due process of law. It was competent for the legislature to invest the drainage board with power, in good faith and after notice and an opportunity to be heard, to finally determine the benefits accruing to each tract of land in the drainage district * * *.' We see no reason to depart from a rule thus so well established in this state."

The Soliah case originated in North Dakota about 1906. It quotes with approval the case of *Erickson vs. Cass County,* which was decided in 1902, reported in 92 N. W. 841, and it was claimed in the Erickson case, as well as the Soliah case, in State Court, that the law was unconstitutional because it did not accord the property owner a sufficient hearing. Under the law then existing, Sections 1818 to 1850, inclusive, Revised Code 1905, North Dakota, no preliminary notice and hearing upon the formation of the district was required or was given. The surveyor prepared profiles, plans and specifications and an estimate of the costs, maps and plans, and then filed the same with the County Auditor, and the same were subject to inspection, but no published or posted notice was given. Sec. 1821 R. C. N. D. 1905, provided:

> "All persons whose lands may be affected by any drainage may appear before the Board of Drain Commissioners and fully express their opinion upon the matters pertaining thereto."

But there was no notice required or given, and no hearing given upon said matter. The only notice and hearing required and given under the then North Dakota law was provided under Sec. 1825 and 1828, Code 1905, which in substance provided that the assessment should be subject to review after ten days' notice of the time and place when and where such assessments would be reviewed; such notice to be published and copies thereof, not less than five in all, and at least three in each township or municipality interested, should be posted. Here was the only notice and opportunity to be heard upon the question of benefits, and yet the North Dakota Supreme Court in the Erickson case held the law to be constitutional, and further said that all acts leading up to the actual making of the assessment were altogether preliminary and did not in themselves impose any burden upon the land owner, and for that reason one notice and hearing upon the question of the benefits satisfied the due process of law clause. This is the same law under which the Soliah case was instituted. After the Soliah case was decided in state court in 1908 and before it reached a decision in this Court on January 9, 1912, the legislature of North Dakota, at its 1911 session, amended Sec. 1821 of the Code of 1905 and included therein the necessity of issuing a preliminary notice, as is mentioned by this Court in its opinion. It will thus be seen that the Soliah case specifically decides that if *a notice and hearing is* given to the property owner at any time prior to the tax becoming a lien upon his property, at which hearing he has the right to contest the validity of the law or proceedings and the amount of benefit to his property, the constitutional requirement is

fully satisfied, and, therefore, that case fully substantiates appellees' contentions here.

What appellant, on page 30 of its brief, says regarding the statements in the opinions by Judge Kenyon in the Circuit Court of Appeals and by Mr. Justice Stone in this Court upon the appeal of the former case between these same parties, is true, but appellant apparently fails to properly construe such statements. After the decision of that case in the United States District Court for South Dakota, which Court held that the drainage law of South Dakota did not violate the Fourteenth Amendment, appellees herein appealed such case, first to the Circuit Court of Appeals and then to this court, but in neither of said appeals did appellees assign or specify as error the ruling of the trial court upon the constitutionality of the drainage law; and appellant herein, (appellee in said former suit), did not cross appeal, although said holding and determination was against appellant's contention, and it received only part of the relief demanded in said former case. The ruling of the Trial Court upon said constitutional question not having been assigned or specified as error, such matter was not before either of the appellate courts for determination as a question in said case, but was of course, before each of said Courts and was a substantial question in sustaining the jurisdiction of said Courts, but for that purpose only.

Appellees therefore, respectfully contend that there is no merit in appellant's contention that a

notice and hearing must be given before the establishment and physical construction of the drainage ditch in order that said law shall not be in violation of the Fourteenth Amendment to the Constitution.

II & III.

DRAINAGE LAW PROVIDES FOR PROPER NOTICE AND HEARING TO RAILROAD COMPANIES, AND PROVIDES FOR PROPORTIONATE ASSESSMENT AGAINST RAILROAD COMPANIES.

Appellant, in the second and third points, urged, (pages 30 to 36 of its brief), claims that the drainage law is in violation of the Fourteenth Amendment for the reasons: (1). That even though a proper notice of hearing is given as to ordinary land owners, there is no statutory provision for giving notice to railway companies; and (2) that the law is defective, in that while it provides for the Board to determine the "proportionate benefits" to land owners, the Board is required to ascertain "the benefits" which a railway company may obtain.

An analysis of the drainage statute and provisions of law applicable to this contention will disclose the fallacy of appellant's contention.

Sec. 8464, R. C. 1919 (R. 32-33), provides:

> "Whenever an assessment for drainage * * * has been made against any county, city, town or township, as provided in this chapter, the officers of such county, city, town or township whose duty it is, under the law, to make the levy of taxes, shall, at the time of the next annual tax levy after the making of such assess-

ment, make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment * * * and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes."

Renville State Bank vs. Kingsburg, 40 S. D. 191, 197; *Wood Bros. vs. Yankton Co.,* 21 Fed. (2d) 267 (C. C. A. 8th Cir.).

This section also provides (R. 32):

"From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and *perpetual liens* upon the respective tracts so assessed."

Thus it is apparent that so far as the nature of the tax and the method of collection, there is a clear distinction between the tax against a tract of land, which becomes a lien, and the tax against a county, city, town or township, and that as to the latter, the tax is a mere personal tax and never becomes a lien against any of the municipal property.

Sec. 8464 further provides (R. 31), as to the notice which shall be given by the Board after the assessment is made:

"Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment, and the amount of each assessment, (all this as to tracts of land) *together with* the amount assessed against the county or any city, town, township or railroad company."

Here we observe two propositions: (1). That the county, city, town or township and the railroad companies are placed in one class, as they are connected by the alternative word "or"; (2) we also observe that the owners of tracts of land are in one category and the provision for them is connected with the provision for county, city, town, township or railroads with the words "together with", thus clearly indicating two different taxable ententies or classes of property, and we have already shown (61, Supra) that as to the county, city, town or township, the assessment or tax is a mere personal tax and not a lien upon any of its property.

A railroad cannot be regarded as mere land to be taxed like farm land or building lots. Its value depends upon the whole line as a unit to be used as a thoroughfare and means of transportation. One mile or two of its length is almost valueless of itself (*U. P. Ry. Co. vs. Ryan,* 113 U. S. 516, 522). In the case of *Keokuk vs. Salm,* 258 U. S. 122, it is said:

> "Payment of taxes as finally assessed and extended against real estate is enforced, (as against railroads) in the first instance, not by distraint or levy, but by legal proceedings. * * An application is made by the collector to the county court for judgment against the property."

Sec. 6606, R. C. 1919, (*) provides that all laws relating to enforcement of payment of delinquent

---

(*) See Appendix B, pages i to v, infra).

taxes shall be applicable to all taxes levied under the provisions of that article (Railroad Companies) and that whenever such taxes are delinquent, the county treasurer having control of such delinquent taxes may proceed to collect the same in the same manner and with the same rights and powers as a sheriff under execution, except that no process shall be necessary to authorize him to sell engines, cars or rolling stock for the collection of such taxes.

By Sec. 6664, R. C. 1919, (*) it is provided that the provisions of the Code relating to general taxes shall apply to the enforcement and collection of delinquent special assessments against a railroad company so far as the provisions are applicable, and that whenever references are made to general taxes, the same shall be contrued to include special assessments as well as taxes for general purposes.

Sec. 6662, R. C. 1919, (*) provides in substance that if a railroad company refuse or neglect for a period of thirty days after a tax becomes delinquent to pay such tax, the county treasurer, in addition to other remedies provided by law for the collection of personal property taxes, may maintain an action in court in his name against such railroad company and if it is found the company is indebted for such taxes, judgment shall be entered accordingly; and the defendant may set up by way of answer any defense which it may have to the collection of such taxes, including the defense that the assessment and proceedings therefor are voidable or even void.

Sec. 6663, R. C. 1919, (*) provides that where a

(*) See Appendix B, pages i to v, infra).

railroad company shall neglect or refuse to pay any special assessment, the officers charged with the collection of the same, when it shall become delinquent (after the judgment is obtained) "shall collect the same by seizure of engines, cars, rolling stock and any personal property of such company in an amount sufficient to pay the special assessment, accrued interest, penalty and costs, advertise the same for sale at least ten days, and if the amount thereof is not paid before the day of sale, the treasurer shall sell the same at public auction."

The procedure, therefore, for the collection of the special drainage assessment against a railroad is approximately as follows: Thirty days after the assessment is made, the Board gives a notice of two weeks' publication of the time when a certified copy of the assessment will be filed with the county treasurer, and shall set forth therein the date when the assessment will become delinquent. Upon that date the certified copy of the assessment is filed in the treasurer's office and from the time of filing of the same, it becomes due, payable and delinquent. (See Sec. 8464, R. C. 1919, R. 31).

In case the railroad companys fails or neglects to pay the same for a period of thirty days after it becomes thus delinquent, the county treasurer institutes an action in Circuit Court in his name as treasurer against the company, and the court determines and fixes the amount due or orders it reassessed, and utimately renders judgment for the just amount of taxes due from the railroad company upon such special assessment (Sec. 6662). (*).

(*) See Appendix B, pages i to v, infra).

If the railroad company shall then neglect or refuse to pay the special assessment thus levied and determined, the county treasurer shall, under the judgment so obtained, and without process but with the same right and power as a sheriff under execution (Sec. 6606) (*), seize engines, cars, rolling stock and any personal property of the railroad company in his county, sufficient in amount to pay such special assessment, penalty, interest and costs, and shall immediately advertise for a period of ten days such sale, stating the time and place when such property will be sold; and if the special assessment, penalty and costs are not paid before the day appointed for such sale, the treasurer proceeds to sell the same at public auction (Sec. 6663). (*).

Under the foregoing provisions it is self-apparent that a special assessment against a railroad company under South Dakota law which, as we have hereinbefore shown, is placed by Sec. 8464 R. C. (R. 31) in the same category or class as counties, cities, town or townships, is a mere personal tax which is to be enforced by the sale of personal property by the statutory tax collector, the county treasurer, and that no other procedure for its collection could be followed under the foregoing statute. The county treasurer, as such tax collector in drainage proceedings, could not seize a few miles of railroad, which few miles would constitute a part of a large interstate carrier system, and sell those few miles under this law, under the general proposition that such assessment is a lien upon such property. Beyond doubt, if such action were taken, it could and

---

(*) See Appendix B, pages i to v, infra).

would be restrained as an interference with the carrying on of interstate commence. Thus the railroads, so far as their special assessment is concerned in drainage matters, are clearly and plainly placed by this statute in the same category as counties, cities, towns and townships, and are classified and named in the drainage statutes as "persons" and not "tracts so assessed" by Sec. 8464. (R. 31). Thus it becomes apparent that the legislature clearly intended a distinction by the use of the words in the drainage law of "tract" and "property" and the words "persons" and "tracts so assessed." With the foregoing distinctions in mind and the proposition that so far as assessments are concerned and the method of collection of the same, there are two distinct classes or entities, namely, one where the assessment is on real estate and becomes a lien thereon and the other where the tax is a mere personal tax and never becomes a lien on real estate, but is collected in an entirely different statutory manner, let us again examine Sec. 8464, R. C. 1919, covering assessments.

Sec 8464, R. C. 1919 (R. 31), provides:

> "After the equalization of the *proportion* of benefits, the Board may make an assessment against each *tract and property* affected in *proportion* to the benefits as equalized."

A copy of the certified assessment is filed with the county auditor:

> "but before the same is filed, a notice shall be given * * *. Such notice shall contain a description of the property assessed, the name

> of the owner * * and the amount of *each* assessment, *together with* the *amount* assessed *against* the county, city, town, township or railroad company. * * * From the time of filing such certified copy of assessment * * * the same shall be due and payable and shall be valid and perpetual liens upon the respective *tracts so assessed,* and against *all persons* or governments except the state and the United States."

It will be observed from the foregoing quotation that the assessments to be made are against each "tract *and* property affected" and that from the time of filing the certified copy of assessment, the same "shall be valid and perpetual liens upon the tracts so assessed" and shall be due and payable from "all persons or governments except the state and the United States," from which it appears that the assessment is not only made against two separate taxable classes, but also that these assessments become liens against tracts of land at certain times as to one class, and become due and payable at a certain time from the other class, namely, "all persons or governments." Not only does this section fix the fact that these taxes become liens against certain real estate at certain times, but the statute also fixes a due date, from and after which the personal taxes therein referred to become delinquent, but which are not liens of any kind.

We have hereinbefore called attention (61-62, supra) to the provisions in the notice given under this section, showing the distinction between "amount of each assessment" against the tracts of land and the "amount assessed against the county, etc., or railroad company". Here, again, the distinction is ap-

parent between the assessments against tracts of land and assessments against a railroad company. In the former, a description of the tract is required and the amount of "each" assessment against these tracts must be given, while as to a railroad company the law requires that the "amount assessed against the railroad company" need be given only in such notice, again exemplifying the distinction that appears throughout this law that some of the assessments are made against tracts of real estate which become valid and perpetual liens, and that other assessments are made against "all persons" and are not liens against such persons' real estate but are a personal tax and collected by a statutory method.

It will further be seen that the assessments against these two different classes are made at the same time. These two assesable classes are by the statute joined together and connected by the words "together with". This connecting clause means "along with", "conjointly", "in company with", "at the same moment of time", etc., (8 Words and Phrases 6992), thus showing that the assessment against each of these two classes is made at the same time and in the same manner.

Now with this analysis in mind, showing the two separate taxable classes which are assessed, let us examine Sec. 8463, R. C. 1919, (R. 30), to determine the steps directed to be taken which lead up to such assessment.

It is alleged in the bill (R. 3-4), and it is true, that the drainage statutes of Souht Dakota are

found as Chap. 98, Laws 1905; Chap. 134, Laws 1907, and amendments, which were finally codified in 1919 as Section 8458-8491 inclusive, of the 1919 Code of South Dakota.

Sec. 6463, R. C. 1919, was formerly Sec. 6, Chap. 134, Laws 1907. Sec. 8464, R. C. 1919, was formerly Sec. 7, Chap. 134, Laws 1907.

Sec. 6, Chap. 134, 1907, in providing for the notice of equalization of benefits, says that such notice shall, among other things, state the "proportion of benefits fixed for each tract *or* property, taking any particular tract as a unit." This Sec. 6 was amended by Sec. 4, Chap. 102, Laws 1909, and therein it again appears that the notice should contain the proportion of benefits fixed for each "tract *or* property." No further amendments or changes were made, and this section, as said above, became Sec. 8463, R. C. 1919. (R. 30).

Sec. 7, Chap. 134, Laws 1907, provided in regard to the assessment that the ,'Board make an assessment against each tract *and* property affected in proportion to the benefits as equalized." Sec. 7 was amended by Chap. 102, Laws 1909, which again provided that the assessment was to be made against each "tract *and* property." Sec. 7, Chap. 134, Laws 1907, as amended by Chap. 102, Laws 1909, was again amended by Chap. 130, Laws 1911, and there again it is provided that the Board may make an assessment against each "tract *and* property." This section in 1919 became Sec. 8464, R. C. 1919, where it again appears and is still the law and reads "tract *and* property." (R. 31).

But when Sec. 6 of Chap. 134, Laws 1907, as

amended by Chap. 102, Laws 1909 — both of which read "tract *or* property" — was transferred or copied into the Revised Code, and a typographical error was apparently made and the word "or" was erroneously changed to the word "of", so that Sec. 8463, R. C. reads "tract of property." (R. 30).

Reading Sec. 6 and Sec. 7, Chap. 134, Laws 1907, and their subsequent amendments prior to the codification, it will be observed that they are harmonious and that an entirely different thing was intended by the words "tract" *and* "property". As these two provisions now appear in the code, wherein assessments are made upon "tracts *and* property", but the apportionment upon which the assessments are made is "tract *of* property", they are absolutely inharmonious. Correcting this typographical error in Sec. 8463 to read as it should read, Sec. 8463 as here applicable reads as follows:

> "After the establishment of the drainage * * the Board * * shall *fix* the *proportion* of benefits * * among the lands affected * *. The *proportion* of benefits which any county, city, town or township may obtain * * to highways or otherwise, and the benefits which any railroad company may obtain for its property * * shall be fixed * * *together with* the proportion of benefits to tracts of land."

A notice is required by this section, which:

> "Notice shall state * * a description of each "*tract* of land affected * * and the *proportion* of benefits fixed for each tract *or* property, taking any particular tract as a unit, and shall notify *all such owners* to show cause why the

proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the *proportion* of benefits the Board shall finally equalize and fix the same according to benefits received." (R. 30-31).

The natural as well as the statutory required sequence of acts which the Board shall take under this section is (1) fix the tentative proportion of benefits; (2) give notice of hearing on equalization; (3) equalize the tentative proportion of benefits; (4) finally fix the proportion of benefits as equalized.

When the law requires a notice which shall contain the decision of the Board on the proportion of benefits fixed by them for each tract *or* property, necessarily such law directs the Board to take such precedent acts and to make such decisions prior to the notice. Hence the Board is directed to fix "the *proportion* of benefits for each tract *or* property, taking any particular tract as a unit", and it is provided in this section that thereafter the Board shall "notify *all* such owners (of both "tracts" and "properties") to show cause why the *proportion* of benefits shall not be fixed as stated."

Thus it will be seen that the Board is directed to apportion the benefits to each of these separate taxable classes, namely, to tracts of land and to properties, and that subsequent to the first act, namely, fixing the tentative apportionment of benefits, this section requires a notice of equalization to be given by publication and posting, which notice, so far as the tracts of land are concerned, requires a description of each tract affected, the name of the owner

thereof, and the proportion of benefits fixed therefor; that so far as the other property owners are concerned, the statute requires their names and the proportionate amount fixed against each. As can readily be seen, the requirement of a specific description of the latter's property is not necessary, as the tax never becomes a lien upon the same and is a personal tax only, but he, like the owner of the tract of land, receives the same notice, which the law provides "shall notify all such owners (of both tracts and properties) to show cause why the *proportion* of benefits shall not be (finally) fixed as stated." Upon this hearing of "the equalization of the *proportion* of benefits", the Board finally equalizes and fixes (not fix and equalize) the same according to benefits received. *Milne v. McKinnon*, 32 S. D. 627, 632; *State v. Risty*, (S. D., 1927), 213 N. W. 952, 958; *Curtis v. Pound*, 34 S. D. 631, 633.

Thus it will be seen that this section of the statute requires the same notice to railroads as to owners of tracts of land and that such notice is required and given before the equalization hearing and before the final fixing of the apportionment prior to making assessment.

Again, looking at the statute from a different angle, it will be observed that the apportionment made to "tracts" *and* "properties" "shall be fixed and equalized (not equalized and fixed) *together with* the proportion of benefits to tracts of land." Now if the Board fixes the proportion of benefits "together with" the proportion of benefits to tracts of land, such fixing must have been at the same moment of time, because the words "together with" here mean "in union with", or "at the same moment

of time", "simultaneously", "contemporaneously" (8 Words and Phrases 6992); and if done at the same moment of time or simultaneously with the proportion of benefits to lands, then such fixing was done before giving of the notice to "all such owners" to show cause "why the proportion should not be fixed as stated."

Then if the Board equalizes such proportion of benefits "together with" the proportion of benefits to tracts of land, that again means at the same moment of time, and *after* notice and opportunity of hearing thereon, as provided for the owners of tracts of land.

The statutory requirement with reference to said fixing of benefits and equalization thereof received by railroad companies has the same limitation as is placed upon tracts of land and county, city, town or township, as it is provided that the same must be done "together with" the proportion of benefits to tracts of land. That again means that the fixing must be done at the same time as the fixing against tracts of land, and that is clearly *before* the notice is given to "all such owners", and the equalization comes *after* such notice and at the hearing given pursuant to such notice.

The words of the statute considered in the light of their definitions (both literary and legal) and the natural as well as statutory sequence of acts directed, forbids any other construction than that the intention of the legislature was that the tentative proportion of benefits which the statute directs shall be fixed against municipalities and railroad companies should be fixed *at the identical time* and

at the same sitting that said proportions are tentatively fixed against tracts of land, that is, before the notice of equalization hearing is given, and the equalization against said classes of persons is to be made at the same time and sitting as the final equalization against tracts of land, and this the statute clearly shows is *after* notice and opportunity to be heard.

We have now attempted to point out that this drainage law directs an assessment upon two different taxable classes, namely, *tracts of land* and *property,* and that as to the former, the assessment when made, becomes a lien, and as to latter properties, the assessment, when made, is only a personal tax and is collected by the statutory method provided therefor; that the apportionment likewise is made upon these same two separate taxable classes, and that notice is required to be given to each of such classes, who may show cause why the proportion of benefits tentatively allotted to them should not be finally fixed as stated in the tentative allotment, and that such fixing to each of these classes is done at the same time and prior to said notice; that an opportunity of contesting these tentative proportions of benefit is given to each of these two classes upon the hearing on equalization. But appellant further insists that the law is defective because as is said (P. 34, Appellant's Brief), it provides that the Board shall determine the proportion of benefits to land owners and benefits to a railroad company. We have already shown, we believe, the fallacy of this contention in our analysis already given.

However, we will give a further suggestion to help clarify this situation.

It must be kept in mind that there is a vast difference between "actual benefit" and "assessed benefit". The former is the total actual benefit to the real estate or property affected, the method of determining the number of units of such we have hereinbefore explained (page 53, supra); while the "assessed benefit" is that proportion of the total actual benefit which is assessed against the specific tract or property considered, which has been determined by mathematical calculation is necessary to raise the total amount of the costs of construction of such drainage project, and is arrived at as follows: After having determined the number of units of actual benefit to the separate tracts and properties in the drainage assessment area, the same are then added together. In this case there appear to be some over 32,000. The total cost of the project is then determined, and this total cost is divided by the total number of units of actual benefit, giving as a quotient the assessed value of the unit. This assessed value of the unit is a proportional benefit and may be any amount up to the actual benefit to the unit, but never to exceed the actual benefit.

Now appellant claims that Sec. 8463 directs the fixing of the "benefit" to a railroad company and the fixing of the "proportion of benefit" to tracts of land. (Appellant's Brief, page 35). If this were true, then Sec. 8464 is meaningless, because it says:

> "After the equalization of the proportion of benefits, the Board may make an assessment

against each tract *and* property affected, in *proportion* to the benefits as equalized."

Why provide for the Board to make an assessment "against each tract *and* property affected, in *proportion* to the benefits as equalized" if, as claimed by appellant, the actual benefits were already fixed to the railroad company? How could this be done in any event, where it is directed by this section that the assessment is only made against property benefited in "proportion" to the benefits as equalized?

Again, we have already shown that this law places the county, city, town or township in the same class or category of taxable entities as a railroad company, and Sec. 8463 clearly directs the Board to fix "the *proportion* of benefits against any county, city, town or township."

Viewing the same matter from yet another angle and again exhibiting this distinction, it will be seen that this section when naming that which is benefited, for which an apportionment is to be made and an assessment thereafter by the next section ordered, as to real estate in general says "lands affected"; as to the county, city, town or township, it says benefits to "highways or otherwise"; but when it comes to railroads it says benefits "which (it) may obtain *for its property,*" and does not limit the benefits to the railroad right of way or to its line of rails or to its station or station grounds or to its bridges or culverts, but says all of its property.

Upon the foregoing analysis, appellees respectfully contend that the statute clearly directs the fix-

ing of a proportional benefit against railway companies in the same manner as it directs the fixing of a proportional benefit against counties, cities, towns or townships, and also tracts of land, and that it likewise directs the giving of notice of equalization to railways in the same manner as it directs the giving of such notice to counties, cities, towns or townships and owners of tracts of land, as "all such owners." To this must be added the fact that there is nothing in the statute to indicate the intention of the law-making body to cause a different apportionment to be made against railroads than is made against an owner of a tract of land on any county, city, town or township. In fact, the exact opposite is evidenced throughout the statute, and the statute clearly indicates that the apportionment to railroads is a proportionate apportionment of benefits, the same as is apportioned to the other taxable entities.

This Court, in the case of *Hawaii vs. Mankachi*, 190 U. S. 197, 212, 213, in discussing the matter of construction extensively, points out former pronouncements, thus:

> "A thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter. The intention of the law maker is the law."

And another parallel, thus:

> "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of a statute is not

> within the statute unless it be within the intention of the makers."

Again, in the case of *U. S. vs. Katz,* 271 U. S. 354, 357, speaking through Mr. Justice Stone, this Court said:

> "All laws are to be given a sensible construction; and a literal application of the statute which would lead to absurd consequences should be avoided whenever a reasonable application can be given to it consistent with the legislative purpose."

Applying the foregoing reasonable rules to the situation here presented, we have a law that does not violate the Fourteenth Amendment to the Federal Constitution, even as to municipalities or railroads. Appellees respectfully submit that a reasonable and sensible construction applied to this statute dictates that the benefits to all persons affected, whether they are owners of tracts of land, municipalities or railway companies, are directed to be apportioned proportionately, and each and all are given notice and opportunity to be heard before their respective apportionments are finally equalized and fixed.

That the notice required by the statute and given meets all the requirements of the due process of law clause is as equally true to this notice as it is to the other given for the establishment of the ditch. (See cases cited pages 51-52, supra).

For which reasons appellees respectfully contend that the South Dakota drainage statute is not in violation of the Fourteenth Amendment to the Federal Constitution.

IV.

THE STATUTE DOES NOT REQUIRE ASSESSMENT FOR COST WITHOUT REGARD TO THE RELATION OF BENEFIT TO COST.

Appellant, under its fourth point, pages 36 to 39 of its Brief, contends that the law is defective because it does not provide for a determination that the costs of the drainage will not exceed the benefit to be derived, and give a notice and hearing upon the proposition.

(A). If by this appellant means the total costs and the total benefit, it is in error.

Our argument on appellant's first contention, (pages 37-47, supra), is equally applicable to the situation here presented by appellant. The Federal Constitution assures to appellant no hearing upon the total costs and total benefits. In the case of *Dunn vs. Fort Bend Co.*, 17 Fed. (2d) 329, 333, tried before a three-judge court, that Court said:

> "The Fort Bend County road district was valid under the state laws and is still valid under those laws. It was authorized to operate as a district levying and collecting taxes and issuing bonds, and still may do so in all respects and against all persons, except *in a case in which some individual is in a position to claim that he has a right, under the Fourteenth Amendment, to claim relief.* These general considerations we think sufficient, without others, to defeat plaintiff's suit, for even if the facts showed *that there are some persons in the district in a position to defeat the tax as to them,*

this would not be sufficient to authorize plaintiffs to rescind their contact and recover back money which they had voluntarily paid. There are other considerations, however, which make it more clear that plaintiffs present no equity whatever for relief. The first of these is that the invocation of the Fourteenth Amendment is a privilege; the fact that a statute may be obnoxious to the Fourteenth Amendment *as to a particular person* does not mean at all that it may be so as to another; and that this right to invoke the Fourteenth Amendment, being a personal privilege, may be lost by election, waiver or estoppel."

From the foregoing it is apparent (1) that appellant must bring himself within the class of persons protected by the constitutional provision; (2) that he can complain of that which affects himself personally; how the law affects someone else is none of his concern nor can he raise that question. Therefore he can only be concerned with the total cost as to himself and the total benefit as to himself, and of this alone can he complain.

In the case of *Ross vs. Board,* (Iowa, 1905). 104 N. W. 506, 510, that Court said:

"In the case before us there is, under the statute, ample provision for notice to every land owner and opportunity given for the hearing of all objections *he* may have to assert against the validity and justice of the proposed charge against *his* property. This, under the law, is all he can rightfully ask."

In the case of *Voight vs. Detroit*, 184 U. S. 115,

122, wherein it was claimed that the act was bad because it did not limit the total assessment of the district to the amount of its benefits, the same as is suggested in the case at bar, and wherein this court in discussing the law, said that it provided for the formation of a district in the vicinity of the proposed improvement, the limitation of the district to be determined by the benefits derived from the improvement, and further provided that the council should determine what proportion of the costs should be assessed upon the owners of the real estate benefited, and said:

> "It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law, and such purpose cannot be defeated if a hearing to the property owner can prevent defeat. He is given a thoroughly efficient opportunity to be heard to *test the legality of the charge upon him. And it is only with the charge upon him that he is concerned, and of that alone can he complain.*"
>
> *Spencer v. Merchant,* 125 U. S. 345, 356.
> *Soliah v. Heskin,* 222 U. S. 522, 524.

Appellees therefore respectfully assert that the Federal constitutional provision concerned here affords appellant no right to a notice and hearing upon what shall be or is the total cost and total benefit of the drainage project. He is and can be concerned only with the total benefit as to himself and the total amount that he will be compelled to pay for such benefit, and we have already shown

herein that he is given a notice and hearing and an opportunity to be heard upon those questions.

(B). If, on the other hand, appellant intends to raise the question that it has not had the opportunity of determining the cost as to it in relation to the benefit which it receives, then appellees assert that that argument has already been hereinbefore answered and disproved. (Pages 52-54, supra).

We further respectfully show that R. C. Sec. 8469 (R. 36), concerning appeal from the determination of the board at its hearing on apportionment of benefits, reads:

> "Upon an appeal from an assessment of benefits, the Court or jury shall consider * * * * the question as to whether the *tract* taken as a *unit* is benefited or not, and if benefited, to what extent."

This same issue may be presented before the Board of County Commissioners at the hearing upon equalization. *State vs. Risty,* (S. D., 1927), 213 N. W. 952, 957; *In re Drainage Ditch No.* 12, 44 S. D. 157, 160. The hearing provided by Sec. 8463 R. C., after due notice affords appellant ample opportunity to determine the relation of the assessment made against its property to the benefits received by it.

But appellees assert that appellant is not in a position to urge this argument in the present case.

This court, in the case of *Standard Stock Food Co. vs. Wright,* 225 U. S. 540, 550, said:

> "One who would strike down a state statute

> as violative of the federal constitution must bring himself by proper averments and showing, within the class to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the federal constitution." (Citing several decisions of this Court).

Appellees contend that appellant nowhere makes proper averments in its bill and makes no showing whereby appellant exhibits that the assessment, per unit, to it, is greater than the benefit to the unit, and until such averment and showing is made, appellant is not in a position to present and argue in this court the question of the relation of the cost per unit to the benefit per unit.

We have hereinbefore shown the method pointed out by the statute and employed in making apportionments and assessments. (See pp. 53 and 75, supra). We have also hereinbefore shown what issues can be raised upon the equalization hearing. (See pp. 53 to 55, supra). And appellees concede that the assessed benefit per unit cannot be greater than the actual benefit per unit, and respectfully assert that this particular point must be reached by a protestant by taking advantage of the statutory provision permitting him to question the actual benefit to the unit, fixed thereon by the Board in accordance with this statute; and that if such protestant does not controvert the value of actual benefit placed by the Board in the exercise of its best judgment upon the tract selected as a unit, then such protestant cannot thereafter claim or as-

sert that his assessment per unit is greater than the benefit per unit.

Turning now to appellant's bill of complaint, appellees assert that appellant nowhere in its bill, by any proper averment or showing, attacks the value of the actual benefit placed upon the tract taken by the Board as a unit; that is, it nowhere questions the "yardstick of measurement". In Paragraph 23 (R. 19), appellant says that no benefits have accrued to the appellant railway company, but if this be conceded to be true, the most that can be said is that the Board has made a mistake. In Paragraph 26 (R. 23), appellant says that the apportionment set forth in Exhibit "C" against appellant was made by the Board without any reasonable or rational basis therefor, and not in proportion to any benefit which the property of appellant has ever received or ever can receive "by the re-building of the spillway and the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2," and "that the property of appellant has not and never can be benefited by the work performed by the Board, as therein set forth, to the extent of $26,000.00 or to any extent whatever", and "that the assessment sought to be made upon property of appellant, as above set forth, is out of all proportion to assessments sought to be levied upon and collected from agricultural lands."

In none of the foregoing allegations does appellant reach the point here presented. All that is said therein is that the Board were mistaken, and this is far from saying that appellant's assessment, per unit, is greater than the actual benefit to the "unit." Again, it will be observed that all of the

foregoing allegations refer to Drainage Ditch No. 1 and Drainage Ditch No. 2. In this connection we call the Court's attention to the admissions made by appellant in the 11th, 12th and 13th paragraphs of its bill of complaint (R. 8, 9, 10), wherein appellant admits that the present project here in controversy is in fact repair and maintenance of Ditch No. 1 and Ditch No. 2. Ditch No. 2 was completed about 1912 and appellant stipulated and paid its admitted just proportion of the cost thereof, or $8,500.00, on April 8, 1912 (R. 127, 131), by which act appellant admits that it received benefits from said old ditches.

Not having brought itself, by proper averments or showing, within the class protected by the constitution — that is, having neither alleged nor shown that the assessment, per unit, is greater than the actual benefit to the unit — in no manner taking issue with the amount of actual benefit placed on the unit — and it affirmatively appearing from the record that appellant admitted a benefit of $8,500.00 by reason of the construction of Drainage Ditch No. 2, by its payment of its assessment in that sum upon the construction thereof, the question of whether the assessment, per pnit, to appellant is greater than the benefit to the unit is not now before this court.

(C). Appellant suggests that the drainage law fixes no limitation as to the amount of assessment that may be made. Sec. 6 of Art. 21 of the state constitution (See Appendix A, infra), provides:

> "The drainage of agricultural lands is hereby declared to be public purpose and the legis-

> lature may provide (for the payment thereof) * * * by special assessments upon the property benefited thereby, according to benefits received."

It will first be noticed that this provision makes no restriction or limitation upon the kind of property that may be assessed, using the broad term "property"; but it does make a restriction and limitation on the amount of the assessment, namely, that the same shall be *"according to benefits received."* The words *"according to"* are defined by Webster's dictionary as meaning "consistent with, in conformity with". See also *Dealy vs. United States,* 152 U. S. 539, 546. In the case of *State vs. Cunningham,* (Wis., 1892), 53 N. W. 35, it is said at page 56:

> "The provision of Section 3 for an apportionment '*according* to the number of inhabitants' is the exact equivalent of the provisions of the ordinance of 1787 of '*proportionate* representation of the people in the legislature'."

This restriction imposed by the constitution is equivalent to a limitation of *within and in proportion to the true benefit received,* because if property received no benefit necessarily there could be no assessment, and if property received some benefit, then the assessment must not exceed the value of the benefit, for an assessment of more than the value of the benefit would not be "proportionate" to or "in conformity with or consistent with" the benefit received. To assess beyond the amount of the benefit received would (to the extent of the excess) be assessing property not benefited.

This Court, in the case of *Cooper Mfg. Co. vs. Ferguson*, 113 U. S. 727, 732, made this pronouncement:

> "As the clause in a constitution and the act of the legislature relate to the same subject, like statutes *in pari materia*, they are to be construed together."

By reading the foregoing provision of the state constitution as a part of the drainage statute, we have a specific restriction that the assessment shall not exceed the actual or true benefit received. At the equalization hearing (R. C. 8463, R. 30), the law provides that the Board shall, after equalizing the apportionment, "(finally) fix the same according to benefits received." Again the phrase "according to benefits received" carries the same interpretation and the same limitation as it does in the constitution, and the assessment only comes after the apportionment has been made, equalized and finally fixed "according to the benefits received", so that the final fixing is not only according to benefits received, but is an equalized fixing. Now the assessments made (R. C. 8464, R. 31) are made against each tract and property affected "*in proportion* to the benefits as equalized", which "benefits as equalized" were made with the limitation and interpretation above given, "according to benefits received."

Hence appellees contend that there is no merit in appellant's fourth contention.

CONCLUSION.

If the parties hereto had not secured an adjudication of the issues here involved in a previous suit between them in all the federal courts, the question of conflict between this court and the state supreme court, stressed in appellant's brief, might be of more consequence; but where the foregoing conditions exist, and there has been established by the former adjudication of this court, between these same parties, certain facts and "law of the case" then such conflict is not here involved. If the questions presented in this suit were presented by another appellant against these appellees, and the decisions of this court and the state supreme court conflicted, then this court would accept and follow the construction placed upon the state statutes by the state court, regardless of whether this court approved such construction or not, and this court has not hesitated, when there has been such a conflict between it and a state court, to overrule its own previous decisions and follow the state decision. (*Edward Hines Yellow Pine Trustees vs. Martin,* 268 U. S. 458, 464, and cases there cited). But inasmuch as it has been established by this court, in a prior action between these same parties, wherein the same constitutional questions were raised, and it was found and determined that the drainage law of South Dakota was constitutional and the work done and performed upon the present project here in controversy was merely maintenance and repair work upon the previously established drainage, such decisions and findings become the settled law of the case as between these parties, and that part of the state decision conflicting with this court's determi-

nation, as between these parties, has no bearing upon this case.

For all the foregoing reasons appellees respectfully submit that the three-judge court properly denied appellant's petition for an interlocutory injunction.

Respectfully submitted,

ELBERT O. JONES, AND
NORMAN B. BARTLETT,
Solicitors for Appellees.
BENONI C. MATTHEWS,
JOHN H. FITZPATRICK,
ENOS G. JONES,
Of Counsel.

Appendix B

SOUTH DAKOTA REVISED CODE, 1919.

PART 9. ASSESSMENT AND TAXATION.

CHAPTER 2.

PUBLIC UTILITIES.

ARTICLE 1.

RAILROAD COMPANIES.

Sec. 6606. COLLECTION, HOW MADE AND ENFORCED. All laws relating to the enforcement of the payment of delinquent taxes shall be applicable to all taxes levied under the provisions of this article, and whenever any taxes levied under the provisions of this article shall become delinquent, the county treasurer having control of such delinquent taxes may proceed to collect the same in the same manner and with the same right and power as a sheriff under execution, except that no process shall be necessary to authorize him to sell engines, cars or any rolling stock for collection of such taxes.

ARTICLE 7.

COLLECTION OF TAXES.

Sec. 6662. CIVIL ACTION TO COLLECT, PROCEDURE. In case any railroad company, telegraph company, telephone company, express company, sleeping car company, private car line company, or other company or corporation coming within the provisions of this chapter, shall refuse or

neglect, for a period of thirty days after the same shall have become delinquent, to pay any tax levied against it, the state or county treasurer to whom such tax is payable shall have the power, in addition to other remedies provided by law for the collection of personal property taxes, to institute and maintain an action in the circuit court, in his name as such treasurer, against such company to collect the tax, with penalties and interest as provided by law. In any such action it shall be sufficient for the treasurer to allege in his complaint that the taxes stand charged upon his books against such company and the same are due and unpaid, and that a debt is thereby created, and that such company is indebted in the amount appearing to be due on the treasurer's books. The treasurer's books shall be received as prima facie evidence, on the trial of the action, of the amount and validity of such tax appearing due and unpaid thereon, and of the nonpayment of the same. If on the trial of the action it shall be found that such company is so indebted, judgment shall be rendered in favor of the treasurer prosecuting such action for the taxes, penalties and costs as in other actions. The defendant may set up by way of answer any defense which it may have to the collection of such taxes. If the defendant claims the tax to be void, the court must in the action ascertain the just amount of taxes due for the year it is claimed the taxes are delinquent, and if, in its opinion, the assessment or any subsequent proceeding has been rendered void or voidable by the omission or commission of any act required or prohibited, the court shall order it re-assessed by the tax commission, and shall thereupon render judg-

ment for the just amount of taxes due from the defendant for that year or years.

Sec. 6663. SPECIAL ASSESSMENTS, PROCEDURE. If any railway company shall neglect or refuse to pay any special assessment levied against such railway company, the county treasurer, city treasurer, or other officer charged with its collection, whenever such special assessment shall become delinquent, shall collect the same by seizure of engines, cars, rolling stock, and any personal property of such company, in an amount sufficient to pay such special assessment, with accrued penalty and interest and all accrued costs, wherever the same may be found in the county or counties in which such special assessment may have been made and levied, and shall immediately proceed to advertise the same for sale in three public places in the county, or by advertisement in one of the newspapers published in the county where such property is taken, for a period of at least ten days before such sale, stating the time when and place where such property will be sold. And, if the special assessment or assessments for which such property is distrained, and the accrued costs thereon, are not paid before the day appointed for such sale, such treasurer shall proceed to sell such property at public auction, or so much thereof as shall be sufficient to pay such special assessment, penalty and cost of such seizure and sale. Any surplus remaining above the special assessment or assessments, charges for keeping, fees for sale, fees for levying on the property and mileage, as allowed by law, shall be returned to the owner; and the treasurer shall, on demand, render an account in writing of the sale and

charges. If the property so distrained and seized cannot be sold for want of bidders, the treasurer shall return a statement of the fact, and return the property to the possession of the railway company from which the same was taken and such tax shall be returned as unpaid.

Sec. 6664. GENERAL TAX PROVISIONS APPLICABLE. The provisions of this code relating to general taxes shall apply to the enforcement and collection of any delinquent special assessment against a railway company, so far as such provisions are applicable, and wherever in this code reference is made to general taxes, the same shall be construed to include special assessments, as well as taxes for general purposes.

Sec. 6665. APPLICATION TO PAST AND FUTURE ASSESSMENTS. This article shall apply to the enforcement and collection of all delinquent special assessments or taxes that may have hertofore become delinquent, as well as to all special assessments or taxes which shall hereafter become delinquent.

SUPREME COURT OF THE UNITED STATES.

No. 98.—October Term, 1927.

Chesapeake and Ohio Railway Company, Petitioner, *vs.* K. S. Leitch.	On Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia.

[April 9, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action brought by the respondent, an engineer, to recover from the petitioner for injuries suffered by him through contact with a mail crane or mail sack hanging from it as he looked from the window of his engine upon the petitioner's road. There is no doubt that the case is governed by the Federal Employers Liability Act, but the respondent got a verdict in the State Court which was sustained by the Supreme Court of Appeals, — W. Va., —, and the question is whether there is any sufficient distinction between this and *Southern Pacific Co.* v. *Berkshire*, 254 U. S. 415, in which it was held that the engineer took the risk. The grounds of that decision were that it is impracticable to require railroads to have no structures so near to their tracks as to endanger persons who lean from the windows of the cars; that they are obliged to erect mail cranes near enough to the tracks for the trains to pick up mail sacks without stopping; that it is almost if not quite impossible to set the cranes so far away as to leave no danger to one leaning out, and that in dealing with a well known incident of the employment, adopted in the interest of the public, it is unreasonable to throw the risk of it upon those who were compelled to adopt it.

Of course it is answered that these general considerations should not exonerate the railroads from using such care as they can within the conditions. But it seems to us unjust to let the risk of a danger that in any event is imminent vary upon disputed evidence that the danger was brought an inch or two nearer than it would have been if a blue print adopted for the whole line had been followed

with a more precisely mathematical accuracy. In the *Berkshire* case the testimony for the plaintiff left a distance of fourteen inches from the end of the crane to the car. Here the plaintiff's witness makes it ten. The witnesses for the petitioner with greater plausibility make it appreciably more. If there is to be a standard in these cases, and if, as decided, the general rule is that the engineer takes the risk, the railroad should not be made liable for this class of injury except where some unquestionable disregard of obvious precautions is shown. The plaintiff here as in *Berkshire's* case well knew of the existence of the crane, which had been in place for three or four years. He was an experienced engineer and although here as there presumably he never had measured the distance, he like Berkshire knew the fact that threatened danger. At the trial Leitch testified that he was looking to see the position of a block signal, pointedly contradicting a statement that he dictated and signed near the time of the accident. He admitted however that it was the fireman's business to look out for the block and notify him, and the fireman's more favorable position for seeing and other circumstances sufficiently indicate that there was no great or sudden emergency, if that would affect the case. Without discussing the evidence in detail we are satisfied upon a consideration of it that it does not show grounds for making an exception to the general rule.

Judgment reversed

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 501.—October Term, 1927.

Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Appellant, *vs.* A. G. Risty, Chris Olson, L. E. Larson, et al., etc., et al.	Appeal from the District Court of the United States for the District of South Dakota.

[April 9, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

This is a suit brought by appellants, receivers of the Chicago, Milwaukee & St. Paul Railway Co. in the district court for South Dakota against the appellees, county commissioners of Minnehaha County, to enjoin the apportionment and assessment of benefits upon appellants' land for the maintenance of a drainage system, under the state agricultural drainage statutes, S. Dak., Laws 1907, c. 134, reenacted as S. Dak. Rev. Code (1919) §§ 8458-8491, as amended by S. Dak., Laws 1920, c. 46, on the ground that the statutes and the proceedings had under them are in conflict with the Fourteenth Amendment of the federal Constitution. From an order of the district court, three judges sitting, denying an application for an interlocutory injunction the case comes here on direct appeal. Jud. Code §§ 238, 266; *Smith* v. *Wilson*, 273 U. S. 388.

One phase of the controversy now presented and the statutes involved were before this Court in *Risty* v. *Chicago, Rock Island and Pacific Ry.*, 270 U. S. 378. In that case it appeared that the railroad company, which is represented by the appellants here, owned lands in Minnehaha County, some of which had not been included within an established drainage district known as "Ditch No. 1 and Ditch No. 2". Those ditches having been seriously damaged by floods, a proceeding had been begun before the county commissioners for the enlargement and reconstruction of the sys-

tem, now described as "Drainage District No. 1 and 2", with the object of assessing the benefits and cost of the work on lands of the railroad company and others lying both within and without the original drainage district.

The suit was begun by the railroad company in the district court for South Dakota to enjoin the county officers from making any apportionment and assessment of benefits affecting the property of the railroad company, on the ground that the drainage statutes of South Dakota and the proceedings under them violated the Fourteenth Amendment of the federal Constitution. The district court held that the statutes were valid and constitutional but that the assessments for reconstruction and maintenance of the existing drainage system, so far as applied to lands outside the original drainage district, were unauthorized by the state statutes. *Chicago, Rock Island and Pacific Ry.* v. *Risty*, 282 Fed. 364. No appeal was taken by the railroad company from the decree of the district court, but on appeal by the county officials so much of the decree as involved the construction of the drainage statutes and their application to lands outside of the original drainage district was affirmed by the circuit court of appeals for the eighth circuit, 297 Fed. 710, and by this Court in *Risty* v. *Chicago, Rock Island and Pacific Ry., supra.*

Following the decision in this Court the appellants began the present suit, in which they raised anew the questions as to the constitutionality of the South Dakota drainage statutes, and sought relief the effect of which, if granted, would be to enjoin those assessments on the land of plaintiffs within the original drainage district which had been left undisturbed by the decree in the earlier litigation.

Appellees, on the present application for an interlocutory injunction, have set up that decree as *res judicata* as to all questions presented here. But an examination of the decree of the district court in the earlier litigation, set out in the present record, discloses that by its terms the decree was "without prejudice to any and all rights of the plaintiff to contest any such apportionment of benefits, or any assessment which may be made" affecting the land of appellants within the original drainage district and saving the right of the railroad company in this regard as though "this suit had not been instituted or this decree entered." Although reliance

is placed upon this decree as *res judicata*, neither the record nor the briefs disclose the reason for the insertion of these provisions and no reason is suggested why its language is not to be taken at its face value as saving to appellants the right to litigate anew the questions now presented.

Since our decision in *Risty* v. *Chicago, Rock Island and Pacific Ry., supra*, the supreme court of South Dakota in *State* v. *Risty*, — S. Dak. —, 213 N. W. 952, has had occasion to pass upon the construction and the constitutionality of the South Dakota drainage statutes. Taking a different view from that of this Court and the lower courts in *Risty* v. *Chicago, Rock Island and Pacific Ry., supra*, it held that the proceedings involved in that litigation and in this, for the assessment of benefits upon lands both within and without the original drainage district, were authorized by the statutes of South Dakota. It held that the action taken for reconstruction of the old drainage ditches was not a proceeding for maintenance or repair of the old system, but a new and independent proceeding, and that the statutes authorized the establishment of a new drainage district embracing all the lands benefited, whether included in the old district or not. It also construed the sections regulating the proceedings for assessing the benefits and costs of the reconstruction and enlargement of the drainage ditches and, as construed, held them constitutional. This construction of the state statutes by the highest court of the state we, of course, accept. *People of Sioux County* v. *National Surety Co.*, February 20, 1928; *St. Louis & Kansas City Land Co.* v. *Kansas City*, 241 U. S. 419, 427.

As determined by the state supreme court in *State* v. *Risty, supra*, the proceedings resulting in the proposed assessment now assailed were taken and authorized under S. Dak. Rev. Code (1919) §§ 8458-8463, as amended. Under § 8459 upon petition of the owners of land "likely to be affected by the proposed drainage" the Board of County Commissioners, under § 8460, caused a survey to be made of the proposed drainage project and, under § 8461, upon the filing of the surveyor's report with the Commission, fixed the line of the proposed drainage ditch as that of the preexisting ditches No. 1 and No. 2, but increased the width of the ditch from approximately forty feet, as originally established, to ninety feet. Notice of hearing upon the petition was given by publication and posting as required by

§ 8461, printed in the margin.[1] The notice as required described "the route of the proposed drainage and the tract of country likely to be affected thereby in general terms" and specifically included the lands of the appellant, which are described in the present bill of complaint. Upon the hearing the Board of County Commissioners, acting under § 8462, made its order establishing the drainage as prayed. Proceeding under § 8463, printed in the margin,[2] the Board then fixed tentatively the proportion of benefits of the drainage among the lands affected and particularly described and gave published notice of the time and place for all owners of the land to be heard on equalization of the benefits.

At the outset appellant challenges the constitutionality of the statutes and proceedings on the ground that the notice of the hearing on the petition for the establishment of the drainage project fell short of constitutional requirements. It is said that notice to all persons affected by the proposed drainage, describing only "the route of the proposed drainage and the tract of country likely to be affected thereby in general terms" is too vague and indefinite to constitute notice to any land owner other than those through whose land the drainage ditch is to be constructed.

---

[1] § 8461. Surveyor's Report—Notice of Hearing.—The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claim therefor at such hearing.

[2] § 8463. Equalization of Benefits.—After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall

If it were necessary to our decision, we should hesitate to say that the required notice was insufficient, at least as to the owners of land embraced within the old district. For it showed unmistakably that the projected improvements were in substance an enlargement of a drainage ditch for the construction of which the lands within the district, including appellants', had already been assessed. No particular form of notice is necessary to satisfy constitutional requirements. If it be such as fairly apprises the land owner of what is proposed and affords reasonable opportunity to be heard it suffices. *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283. No one who, like appellants, had paid assessments for the original construction of the ditch could have doubted that his lands were within the tract "likely to be affected" by the proposed reconstruction.

But in any case there is no constitutional reason why any notice need have been given, for the purpose of the first hearing is not to determine what lands are to be included in the assessment district. It was said by the supreme court of South Dakota in *State* v. *Risty*, — S. Dak. at —, 213 N. W. at 959:

> "The hearing upon this notice is not for the purpose of determining the particular land that may be benefited by the con-

fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed.

> struction of ditch, nor the extent to which any tract of land may be benefited, but to determine whether the proposed drainage or any variation thereof shall be 'conducive to the public health, convenience, or welfare, or necessity, or practical for draining agricultural lands.' If the board finds that such drainage will be conducive to the public health, convenience, or welfare, or necessary or practical for draining agricultural lands, the board may establish the drainage accordingly and proceed to let contracts for the work. It then becomes necessary to determine the particular tracts of land that will be benefited by the drainage and the extent to which it will be benefited."

Due process of law does not require notice of a proceeding to determine merely whether an improvement shall be constructed without at the same time establishing the boundaries of the assessment district. It is enough if land owners who may be assessed are later afforded a hearing upon the assessment itself. *Londoner* v. *Denver*, 210 U. S. 373, 378; *Goodrich* v. *Detroit City*, 184 U. S. 432, 437, *et seq.*; *Voight* v. *Detroit*, 184 U. S. 115, 122; *Embree* v. *Kansas City Road District*, 240 U. S. 242; *Soliah* v. *Heskin*, 222 U. S. 522.

No objection of substance is made to the sufficiency of the notice of the hearing on the equalization of benefits. The lands of the railroad, described in the complaint, were described in the notice as required by the statute. At that time no assessment district had been established and no lien had attached to them nor would any attach until a final assessment had been made. § 8464; *Risty* v. *Chicago, Rock Island and Pacific Ry., supra*, 388. As the statute was construed by the supreme court of South Dakota in *State* v. *Risty*, — S. Dak. at —, 213 N. W. at 959, upon the hearing for the equalization of benefits under § 8463, "an interested party may appear and show any reason why his property should not be assessed that he could have shown at the hearing for determining whether the drainage should be established. If his property will not be benefited by the establishment of the drainage this may be shown at either hearing, and if shown at either hearing his property will not be assessed."

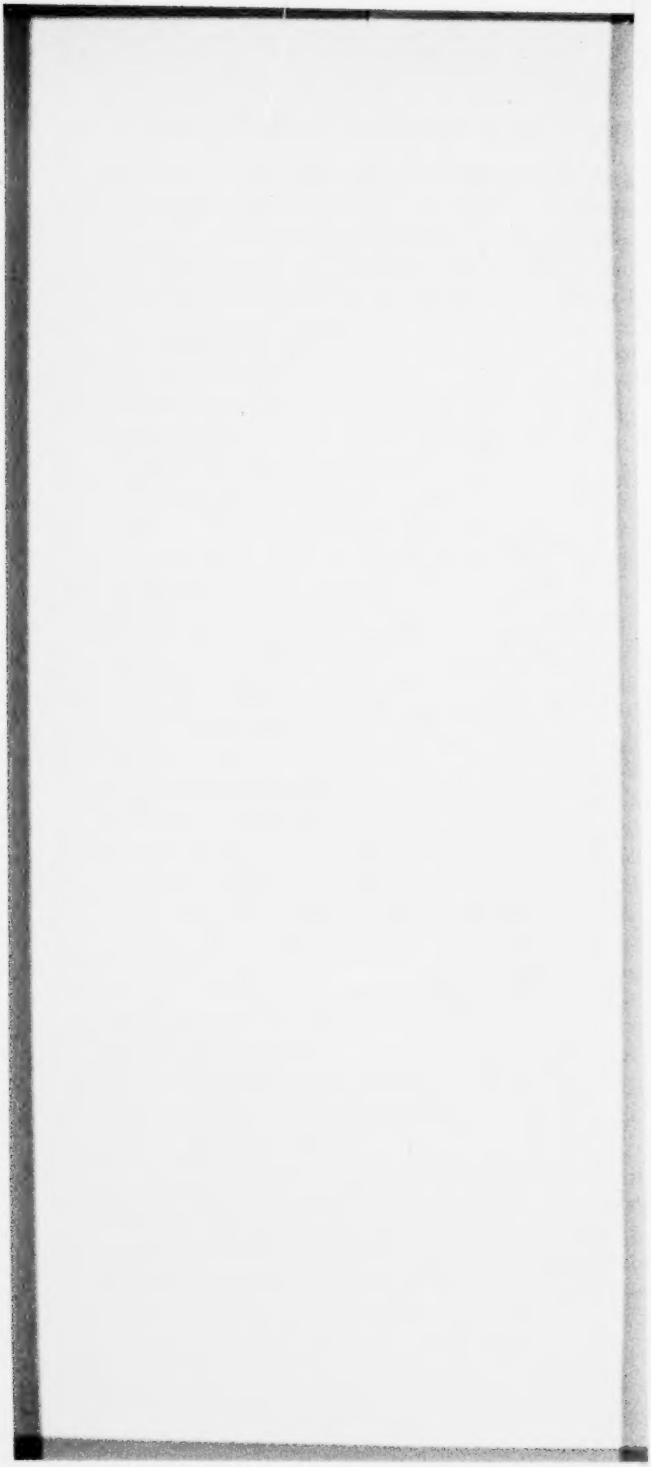
The state court further held that upon this hearing the land owner may be heard upon the question whether his lands are benefited by the drainage system and the extent of those benefits, if any, or whether the proposed assessment was unjust or unwarranted and may raise all constitutional objections to the assessment; citing

Milne* v. *McKinnon, 32 S. Dak. 627, 631, 632; ***State ex rel. Curtis*** v. *Pound,* 32 S. Dak. 492. From determinations of the Board on either hearing appeals lie to the circuit court under § 8469.

Appellants did not appear or file objections on the date set for either hearing and under the state statute as interpreted in *State* v. *Risty, supra,* thus lost their right to urge any objection to the assessment. As the inclusion of appellants' lands in the new assessment district depended wholly upon their being benefited by the proposed improvements, their failure to avail of the opportunity afforded by the statute to make the objections to the assessment now urged forecloses all consideration of those objections here. *Farncomb* v. *Denver,* 252 U. S. 7; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710; *Gorham Mfg. Co.* v. *Tax Commission,* 266 U. S. 265; *First National Bank* v. *Weld County,* 264 U. S. 450.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.